The case of *Lautsi v. Italy*: a synthesis

Grégor Puppinck, PhD,
Director of the *European Centre for Law and Justice*[1].

3 November 2011

This article will be published in the *BYU Law Review* (2012, Vol. 3).

Article presented at the Eighteenth Annual International Law and Religion Symposium, "Religious Freedom in a Pluralistic Age: Trends, Challenges, and Practices," 2-4 October 2011, International Center for Law and Religion Studies, J. Reuben Clark Law School, BYU University..

The case of *Lautsi v. Italy*, better known as the *Crucifix Case*, is particularly significant. Its significance is not only political and legal, but also religious. Never before in the history of the Court 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 Christian symbols in European society. The Court finally recognised, in substance, that in countries of Christian tradition, Christianity enjoys a specific social legitimacy which distinguishes it from other philosophical and religious beliefs. Because Italy is a country of Christian tradition, Christian symbols may legitimately hold greater visibility in society.

Although hundreds of articles have been published on this case, allow me add this article, as I have participated in the defence of the crucifix before the Grand Chamber.

1 Grégor Puppinck, PhD, is the Director of the *European Centre for Law and Justice* (ECLJ). The ECLJ intervened as *amicus curiae* before the Grand Chamber in the Lautsi case. He was made *Cavaliere della Repubblica* by the Italian Government for his contribution to this case. Expert for the Council of Europe, he is a member of the Committee of Experts on the Reform of the European Court of Human Rights.

SUMMERY

Introduction **3**

I. The reasoning of the Second Section **7**
Redefining the aim of the State-school system 7
Educative pluralism as an aim 8
Summary of the Section's reasoning 8
A disputed judgment 10

II. The reasoning developed by the Grand Chamber **11**
Subsidiarity and margin of appreciation 11
Secularism is a philosophical conviction 13
Neutrality applies to the "acting", not the "being" of the State 14
Democracy, denominational neutrality and secularism 15
State education according to the Grand Chamber 18
The crucifix: a passive symbol 19
No interference by the State 20

III. Supplementary comments in the Grand Chamber judgment **23**
The Crucifix and the Islamic headscarf 23
Negative freedom of religion of non-believers 24
Bavarian non-solution 25
Tradition 27
Majority religion 28
Political and religious debate 32
The consequences of the* Lautsi *case 37

Introduction

On the 18th of March 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* (application no. 30814/06).

By this final judgment overturning a unanimous judgment rendered on 3 November 2009 by the Second Section of the Strasbourg Court, the Grand Chamber Judges decided, by fifteen votes to two, that the compulsory display of crucifixes in Italian State-school classrooms did not breach Article 2 of the first Protocol to the European Convention on Human Rights. Article 2 of the first Protocol protects the right of parents to ensure the education and teaching of their children in conformity with their religious and philosophical convictions. Moreover, the Court decided that, for the reasons given in connection with its examination of the rights of parents, no separate issue arose under Article 9, which protects freedom of thought, conscience and religion. Nor did the Court find a separate issue under article 14, which prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention.

Therefore, the rights invoked by Mrs Soile Lautsi and her children, guaranteed by the Convention and Court's interpretations, were not violated by the display of a crucifix in State-school classrooms.

At the root of this case was the refusal by a school-governing body to grant the request of a parent to remove the crucifix from his sons' classroom. To support their request to the school governors, the applicants relied on a recent decision by the Italian Court of Cassation[2] stating 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 the freedom of conscience of those who did not accept any allegiance to that symbol. The principle of secularism, relatively new in Italy, was defined and enshrined as a constitutional principle by a judgment of the Constitutional Court in 1989[3], just five years after the entry into force of the new Concordat which put an end to the system of State religion. 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"*. Thus, secularism in Italy is meant as *"an open and inclusive attitude, closer to equidistance, which respects the distinction and autonomy of spiritual and temporal areas, without privatising religion or excluding it from the public area"* [4].

The custom of displaying a crucifix in classrooms is an age-old tradition in Italy. The present civil obligation allegedly dates back to royal decree no. 4336 of 15 September 1860 of the

---

2 Court of Cassation, judgment No 439, 1 March 2000.
3 Constitutional Court, judgment No 203, 12 April 1989.
4 Presentation of the Italian Government before the Grand Chamber (GC), 30 June 2010, § 7.

Kingdom of Piedmont-Sardinia, which provided: *"Each school must without fail be equipped with ... a crucifix"*. This obligation was maintained under subsequent regimes. 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; further, it was expressly confirmed on 3 October 2002 in an instruction by the Minister of Education[5].

According to the applicants, these provisions imposing the presence of a crucifix *"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"* [6]. In their view, it is necessary to put an end to the *"contradictions and inconsistencies"* of the constitutional provisions regarding religion which were, *"the result of a compromise between concurring political forces within the Constituent Assembly (…) gran[ing]t*[7] *the Catholic Church a privileged position in contradiction with the principle of the secularity of the State"* [8]. Therefore, the applicants contested what they considered an infringement of the principle of secularism in the national administrative courts.

The Veneto administrative court[9] and the Supreme administrative Court refused to follow the decision of the Court of Cassation regarding polling stations and judged that the presence of a crucifix was compatible with the principle of secularism. After a long analysis of what modernity owes to Christianity, the national administrative courts rejected the application, because the crucifix is a symbol which expresses a synthesis of the history, culture, and values of Italy and Europe as a whole. Thus, the crucifix is the objective representation of a series of values regardless of its original religious meaning. Therefore, there is a fundamental compatibility between crucifix and secularism because of a historical "filiation" between them, which is not necessarily the case with other religions or beliefs.

The Supreme Administrative Court's[10] reasoning should be duly noted. Below is a representative extract:

> *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*

5 Instruction No 2666 of 3 October 2002 by the Minister of Education, University and Research.
6 Observations of the applicants in reply to the complementary observations, Section, 16 March 2009, p. 2.
7 Through the reference to the Catholic Church and the Lateran Pacts in the Constitution.
8 Observations of the applicants in reply to the complementary observations, Section, 16 March 2009, pp. 4, 5.
9 Veneto administrative Court, judgment of 17 March 2005.
10 Supreme administrative Court, judgment No 556 of 13 April 2006.

relation to religious society, so that they may be endorsed "secularly" by all, irrespective of adhesion to the creed which inspired and defended them.

The Supreme administrative Court[11] adopted a position opposite to that of the Court of Cassation which, in its 2000 decision, expressly rejected the thesis of the crucifix seen as the symbol of *"an entire civilisation or the collective ethical conscience"* and *"a universal value independent of any specific religious creed"*. Essentially, the Supreme administrative Court and the Court of Cassation Court differ in their interpretation of the meaning and compatibility of the crucifix and secularism.

The Constitutional Court did not have the opportunity to settle the dispute. The administrative court incidentally referred the case to the Constitutional Court, but it ruled that it did not have jurisdiction since the texts which required the presence of a crucifix were only regulations[12]. In this context of case-law divergence, the case was submitted to the European Court.

Thus, after having contested what they considered a violation of the principle of secularism before national courts in vain, the two children and their mother, Mrs Soile Lautsi, applied to the European Court of Human Rights (ECHR) on 27 July 2006. Before the European Court, they claimed their rights to education[13], guaranteed by Article 2 of the first Protocol, as well as their rights to freedom of thought, conscience and religion under Article 9 of the Convention[14] had been violated. Because they were not Catholic, the applicants also asserted that they were treated in a discriminatory manner in comparison with Catholic parents and their children, contrary to Article 14 which prohibits discrimination based on religion[15].

Beyond the specific provisions they invoked, the applicants, supported by Italian free-thought organisations, wanted the Court to pronounce in favour of secularism, as in cases relating to the prohibition of Islamic headscarves in the education system. Their aim was to

---

11 The Supreme administrative Court ruled in favour of the compatibility of the crucifix with secularism in opinion No 63 of 27 April 1988.

12 Constitutional Court, decision No 389, 15 December 2004.

13 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."

14 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."

15 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."

have the Court rule that State's "religious neutrality" was required under the right to freedom of religion for non-believers; more precisely, they sought the Court's ruling in favour of an extensive negative freedom of religion for non-believers. The Court has long ago stated that *"freedom of thought, conscience and religion (…) is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it"*.[16]

This case fell under what is known in English-speaking countries as *strategic litigation*. The aim of Italian free-thought organisations, acting under the guise of Mrs Lautsi, was to use the European Court to reach a political result with general impact which would exceed the original legal scope of the application. This context of strategic litigation is the source of the great legal confusion surrounding this case. Some judges of the Second Section are responsible for this situation. As they were personally favourable toward free-thought, they took the liberty of adopting a reasoning which in fact was political rather than legal. By creating a new obligation of religious neutrality within State-school education, the Second Section forsook legal rigour and judicial reserve. It raised uncertainty in the nature and limits of the Court's competence and deepened its crisis. Moreover, the Second Section focused on the political theme of secularism instead of analysing 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. The prestige and authority of the Court has been seriously impaired.

Finally, the initial strict legal question concerning the impact of the crucifix on the freedom of students and their parents, as guaranteed by the Convention, fell to the background. Persuading the Court to rule back on this main legal issue required great effort. Eventually, the Grand Chamber did, simply ruling, as we suggested, that the presence of a crucifix does not result in indoctrinating the students.

The Grand Chamber also had to correct some assertions of the section decision. It did so, first, by recalling that the European Court is not a constitutional court; it can intervene only subsidiarily and must respect the margin of appreciation of States. On political grounds, it also had to correct the section's assertions concerning the purpose of State-school education and religious neutrality.

As to the merits, contrary to the section decision, the Grand Chamber clearly affirmed that the Convention does not require the complete religious neutrality of State-school education. Further, the Convention does not hinder the States' liberty to *"confer on the country's majority religion preponderant visibility in the school environment"*. 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 (GC § 71-72). The Court did

16 ECHR, GC, 18 February 1999, *Buscarini and others v. San-Marino*, Ap. 24645/94, § 34; ECHR, dec., 29 March 2007, *Spampinato v. Italy*, Ap. 23123/04.

not question the State's legitimate authority to respect religious differences or treat religions differently according to their contribution to the national culture.

The main principle distilled from the *Lautsi* case may be clearly expressed by stating that the Court expects States to *act neutrally* toward citizens but not to *be neutral* in its own identity, neutrality being an essentially relative concept. 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. If there is no infringement of individual religious rights in the sense of the Convention, the State is not bound to act neutrally.

The manifestation by the State of a preference towards a specific religion does not necessarily breach a citizen's individual religious rights. In *Lautsi*, as it was not proved that the crucifix indoctrinated or severely disturbed the pupils, there was no infringement of the applicants' individual religious rights. 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"*[17]. However, as this preference and the way it is manifested are not sufficient to infringe the religious rights of those exposed to it, they do not constitute a violation of the Convention. It would be different if this preference was manifested through the obligation to actively participate in catechism classes or worship within a specific religion. Neutrality is not a general and absolute obligation.

The following summary is what appears from a thorough study of the two judgments of the Court. First, I briefly summarise the Second Section's reasoning in its 3 November 2009 judgment, before presenting the conclusions of the Grand Chamber with more detail.

I. The reasoning of the Second Section

Redefining the aim of the State-school system

The Second Section began its reasoning with a presentation of what it thought freedom of education should be. From there, it proceeded to a new interpretation of the second sentence of Article 2 of Protocol 1, altering 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"*. The Second Section interpreted this sentence as meaning that it entrusts the responsibility of *"safeguarding the possibility of pluralism in*

17 ECHR, 3 November 2009, *Lautsi v. Italy*, Ap. 30814/06, § 48 (hereafter *"Lautsi 2nd s."* means the judgment of 3 Nov. 2009).

education, which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention"[18] to the State rather than the private education system. 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 Section as imposing on the State a duty to make the environment and the content of State education "pluralistic" and consistent with "democratic values" as interpreted by the Court. This is a misinterpretation of the second sentence of Article 2 of Protocol 1: in a democracy, the educative offer should be pluralistic, not the teaching itself. This is more than a shift in the interpretation[19].

Educative pluralism as an aim

The 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."* 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"*[20]. 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"*[21], especially *"the freedom not to believe"*. Finally, the State *"must seek to inculcate in pupils the habit of critical thought"*[22].

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"*. 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. This pluralism finally results in excluding the very possibility of plurality and imposing the monopoly of secularism[23].

Summary of the Section's reasoning

Once a new aim for the State education system has been defined and accepted, it becomes the legal basis of the new standards that are necessary for the implementation of that aims.

---

18 *Lautsi* 2nd S., § 47 b.

19 This becomes clearer when compared to the concomitant ECHR decisions refusing to examine the applications of German parents sentenced to imprisonment because they have chosen home-schooling for religious reasons.

20 *Lautsi* 2nd S, § 47.

21 *Idem*.

22 *Lautsi* 2nd S, § 56.

23 This shows the practical limits of the terminology which promotes pluralism in the name of the values of tolerance, co-existence, or diversity. It is reasonable to deduce that the concept of *pluralism* differs from *relativism* only in its falsely inclusive appearance. Replace *pluralism* by *relativism* in the judgment, and paradoxes vanish.

Here is the summary of the Second Section's reasoning:

1- 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"* (§ 56).
2- Freedom of religion, as guaranteed by Article 9 of the Convention, implies the "negative freedom" not to believe. This negative freedom does not simply protect against co-action, that is to say, for example, the obligation to participate in religious activities. Rather, *"[i]t 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 which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice"* (§ 47*e*, 55).
3- The crucifix has a variety of meanings, among which the religious meaning predominates. 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"* (§51). 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[24] (§54).
4- 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 (§ 55). 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 place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion"* (§ 50).
5- The display of the crucifix may also be *"emotionally disturbing"* for non-Christian pupils (§ 55).
6- 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 (§ 55-57).
7- *"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"* (§ 56). Neither can it be justified by the fact that it expresses Italian history and tradition, because its religious meaning predominates (§ 51-52). The fact that the crucifix symbolises the Italian majority religion does not justify its presence; on the contrary it is an aggravating circumstance (§ 50) [25].

Having stated this, the Court concluded the applicants' rights had been violated. Once the

24 Reference to the *Dahlab* case*,* ECHR, Dec., 15 February 2001, *Dahlab v. Switzerland*, Ap. 42393/98, ECHR 2001-V.
25 This summary takes again, in part, the observations submitted to the Court by the Italian Government.

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, its both general and abstract character: educative pluralism⇔religious neutrality ⇔condemnation of the crucifix.

A disputed judgment
This reasoning affected Italy specifically, but also went much further. The general principles established in *Lautsi* impacted the State schools of the 47 Member States, many of which require or tolerate religious symbols in schools. For example, in Austria, religious symbols are compulsory in primary and secondary schools in accordance with the concordat. This is also the case in Bavaria and other German *Länder* with a Catholic majority, as well as in Greece, Ireland, Liechtenstein, Malta, some State schools in the Netherlands, Poland, Romania, San-Marino, some Swiss cantons, and Alsace-Moselle.

Moreover, the reasoning of the Second Section was meant to apply beyond the present case and circumstances, especially to the courts, parliaments and other public places. This reasoning was understood as susceptible of being extended to the symbols of States, such as national anthems, flags, and obviously the constitution when recognising a particular religion.

Thus, this judgment constituted a decisive step in the secularisation of Europe. Unusually, the Court was not able to morally impose this judgment. Some European States gathered, on the initiative of Rome and then Moscow, a type of "alliance against secularism" [26], supporting Italy to request the case's referral to the Grand Chamber. At first, ten countries[27] intervened in the *Lautsi* case as *amici curiae*. Each of them submitted written observations to the Grand Chamber, inviting it to quash the first judgment. Moreover, eight of them were allowed to intervene collectively at the hearing on 30 June 2010. These observations and intervention are interesting not only from a legal point of view but also as testimonies of the defence of European culture.

In addition to these ten countries, eleven others[28] publicly questioned the judgment of the Court and requested that the national and religious identities and traditions be respected. Several 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 (22 out of 47) publicly opposed the logic of secularisation. In fact, behind cultural and legal arguments, these States manifested their position that they politically recognised religion and affirmed the social legitimacy of Christianity in European society.

26 G. Puppinck, « *Une alliance contre le sécularisme* », *Osservatore Romano,* Rome, 27 July 2010.
27 Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, Russian Federation, and San-Marino.
28 The governments of Albania, Austria, Croatia, Hungary, Macedonia (FYRM), Moldavia, Norway, Poland, Serbia, Slovakia, and Ukraine.

Numerous non-governmental organisations (NGOs) requested to submit observations to the Court, as *amici curiae*. About ten[29] were authorised, among which was the *European Centre for Law and Justice* (ECLJ) [30].

Finally, after the referral of the case, the Second Section's reasoning, including its presuppositions, was reduced to nothing by the final judgment of the Grand Chamber which, by 15 votes to 2, judged that there was no violation of the Convention. In its judgment, the Grand Chamber strictly interpreted the Convention. Finally, it appears that the Second Section's judgment was fundamentally political, and the political reaction it caused resulted in bringing the Court back to an objective and realistic legal path.

Let us now examine the reasoning developed by the Grand Chamber.

II. The reasoning developed by the Grand Chamber

Essentially, the Court determined that the crucifix was an "essentially passive" (GC § 72) religious symbol. It does not imply any "co-action" (coercion) and its impact is not sufficient to constitute a form of indoctrination that would infringe pupils' and parent's (negative) freedom of religion as guaranteed by the Convention and interpreted by the Court. 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. It clarified its own competence and its position with regard to secularity, religious neutrality, tradition, and majority religion. It finally concluded there had been no violation of the Convention.

Subsidiarity and margin of appreciation

In its introduction, the Grand Chamber set the frame of the case and recalled the limits of its competence. 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. Therefore, the Court did not need to rule on the compatibility of the crucifix with the principle of secularity in Italian law (§ 57), nor to arbitrate the disagreement between the Italian supreme courts. The Grand Chamber purposed to reaffirm that it is not a constitutional or fourth instance court, because of its subsidiary

[29] 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.

[30] These observations and other documents are available at www.eclj.org/Resources/lautsi/.

nature. Moreover, its role is to judge concrete individual cases, not to rule on a domestic law provision *in abstracto*.

Such an affirmation was necessary, indeed. The Second Section judgment, pronounced at the beginning of the current process of reform of the Court, aroused a very strong reaction from many Member States; they considered the judgment to exceed the competence of the Court and trespassed on the political field. The keen protests uttered within the Committee of Ministers of the Council of Europe definitely impacted the Interlaken Declaration of 19 February 2010, which was adopted at the end of the high level conference concerning the future that the Court, held in this Swiss town. The *Lautsi* case was at the heart of the discussions in Interlaken. In this declaration, recalling and *"stressing 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"* (PP6), the 47 Member States called for *"a strengthening of the principle of subsidiarity"* (OP2) and invited the Court to *"take fully into account its subsidiary role in the interpretation and application of the Convention"* (OP 9). This was meant to assist in reminding the Court that its competence under Article 19 cannot go beyond the limits of the general powers that the States sovereignly decided to assign to the Court: controlling the respect by States of their obligations under the Convention[31]. In the sense of 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"* [32]. Thus, the subsidiarity of the ECHR institutes a mechanism based on the complementarity of national authorities and 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. 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"* [33], allows the Court to switch from general 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"*. The margin of appreciation requires the Court to respect the discretion of national authorities and to apply the same law to a great 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

---

31 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.
32 ECHR, Note of the jurisconsult, *Principe de subsidiarité*, No 3158598, 8 July 2010, unpublished.
33 ECHR, GC, 19 February 2009, *A. and others v. the United-Kingdom*, Ap. 3455/05, § 184.

the national foundation of every case and prevents the Court from pronouncing theoretical and abstract judgments.

Actually, the Second Section failed to respect most of the implications of the principle of subsidiarity. A surprising and rare failure, the Second Section purely 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 favour of any religious neutrality of State education and, more generally, of society. The only consensus concerned the *distinction* between political and religious areas, not even on their *separation*.

Secularism is a philosophical conviction

After recalling that it does not fall on the Court to rule on the compatibility of the presence of crucifixes with the principle of secularism under Italian law, still in the introduction, 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"* [34] (GC § 58). Thus, secularism is a "view" a "philosophical conviction" in the same way as other convictions and beliefs worthy of respect. Secularism does not have the value of a general principle in the Convention system. This is one of the main contributions of the judgment of the Grand Chamber. This is a two-edged affirmation: it allows the promoters of secularism[35] to insist on freedom of conscience, but they can invoke it only as a conviction among others. They must also accept the intrinsic relativity of freedom of religion and admit that, under the Convention, they cannot claim to embody neutrality itself. This does not question their right to claim that they hold the ideal system and to apply it at the national level, according to the circumstances. However, for the Court, this is a conviction, and is respectable since it is compatible with the Convention, like many other convictions. However, their 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"* (GC § 47)[36].

In its responding observations, the Italian government told the Court that, "*[w]e 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"* [37]. The Grand Chamber went further, it rejected the

34 The GC refers to the judgment of 25 February 1982 on *Campbell and Cosans v. the United Kingdom,* Ap. 7511/76 and 7743/76, § 36.
35 The English version of the judgment uses the words *"the supporters of secularism"* (GC § 58).
36 See the oral intervention of the governments of Armenia, Bulgaria, Cyprus, Russian Federation, Greece, Lithuania, Malta, and the Republic of San-Marino.
37 Complementary Observations of the Italian Government submitted to the Section, p.7, § 10 *(no date).*

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 for any notion which is more political or ideological than legal. Thus the Court was wise to reject it in favour of the notion of neutrality. This rejection significantly weakened the applicants' arguments, which mainly consisted in claiming secularism was a necessary consequence of neutrality.

Neutrality applies to the "acting", not the "being" of the State

Assessing a confessional or denominational school to be 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 the difference during the hearing. To clear up this confusion, which is the implicit basis of the Section judgment, they recalled that there was nothing neutral about the secularism of soviet regimes.

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, and I believe it is a capital point, the obligation of neutrality as understood by the Court concerns State action, not the State's nature in itself (its essence). 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, its essence.

Further, neutrality as an essence is difficult, if not impossible to conceive. 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. 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". The fact for a State to be secular, denominational, or otherwise has no decisive consequences in itself.

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 favourable 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 favourable 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 remain out of it. Those who want the

European Court to overstep its competence 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 defence, it is true that the absorption of morality and religiosity by human rights transforms the European Court of Human Rights into a "conscience of Europe" [38] and ultimate oracle of a new magisterium, which specifically applies directly to States, not only in civil matters but also in moral and religious matters. This magisterium also imposes 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 the spiritual power by transforming the political ideology which rules it into religion.

Finally, the Grand Chamber did not choose this, contrary to the Second Section's opinion. The Grand Chamber held that, under the Convention, the obligation of "neutrality and impartiality" concerns the acts of the State, not its nature. 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"* [39] (GC §60), believers or non-believers.

Judge Bonello expressed it 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* (§ 2.5).
>
> *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* (§ 2.6).

Determining the essence of the State, secular, confessional or otherwise, does not come under the competence of the Court, which expressly refused to arbitrate the Italian domestic debate on the meaning of secularism.

Democracy, denominational neutrality and secularism

The 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*

38 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,* 2011, Third Millennium Publishing,

39 ECHR, GC, 10 November 2005, *Leyla Şahin v. Turkey*, Ap. 44774/98, ECHR 2005-XI, § 107.

educational pluralism which is essential for the preservation of 'democratic society' within the Convention meaning of that term". Thus, the requirement of confessional neutrality of the school environment allegedly results from the concept of "educative pluralism", which 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"* [40].

This opinion is conceivable on 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 privatisation 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"*[41].

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 favour 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 this 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 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"*[42].

Actually, the Convention is not only a set of objective standards, but a system of standards which constitutes an evolutional ideological system that is superposed to the legal system and guides its interpretation. What was at stake in the *Lautsi* case 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[43], Danish[44],

---

40 Observations of the applicants for the hearing of 30 June 2010, p. 6.
41 ECHR, GC, *Lautsi* GC, § 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.
42 Statute of the Council of Europe, London, 5 May 1949, Preamble, § 3.
43 Art. 8: "*The Republic of Armenia recognizes the exceptional mission of the Armenian Apostolic Holy Church as the national church, in the spiritual life, development of national culture and preservation of the national identity of the people of Armenia*".

Greek[45], Hungarian, Irish[46], Icelandic[47], Liechtenstein[48], Maltese[49], Monegasque[50], Norwegian[51], United Kingdom[52] or Slovakian[53] constitutions. Other States, like Spain or Italy, also recognise Catholicism in a special way.

It must be underlined that officially recognising 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-guardiste*, indeed even prophetic. This could be accepted if one considered these religious constitutional provisions are only vestiges of a past political order.

However, some countries go on formalising the relations between temporal and spiritual orders in their constitutions: the Bulgarian constitution of 1991 states that *"Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria"* (art. 13). Very recently, the new constitution of Hungary, symbolically promulgated on Easter Monday 2011 (25 April), frequently refers to Catholicism and the values of Christian Europe which must guide the interpretation of the Constitution.

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 identity roots, has not entirely conquered Europe. It may even be drawing back, due to the social and

---

44 Art. 4: *"The Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State"*.

45 Art. 3 § 1 sentence 1: *"The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ"*.

46 The Irish Constitution, written *"In 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"* (first two sentences of the preamble), recalls in Article 44 that "*The 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"*.

47 Art. 62: *"The Evangelical Lutheran Church shall be the National Church in Iceland and shall in such respect be supported and protected by the State"*.

48 Art. 37 § 2: of the Constitution of Liechtenstein provides that Catholicism is the State religion.

49 According to Article 2 of the Constitution of Malta, the religion of Malta is the Roman Catholic Apostolic religion.

50 The Constitution of Monaco provides in Article 9 that the Roman Catholic Apostolic religion is the State religion.

51 Art. 2 § 2: *"The 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"*.

52 In the United-Kingdom, the same person holds both the office of the Head of State and the Head of the Church, and some seats in the House of Lords are reserved for some bishops of the Church of England.

53 The Preamble of the Constitution of Slovakia recognises the spiritual heritage of the saints Cyril and Methodius.

cultural constraints imposed by the globalisation.

Identifying democracy and secularism also raised a problem concerning the coherence of the European Court case-law. The Section judgment was contrary to the constant case-law of the Commission and Court. As early as the case of *Darby v. Sweden*, the former European Commission of Human Rights stated that *"A State Church system cannot in itself be considered to violate Article 9 (Art. 9) of the Convention"*[54]. More recently, in the famous judgment on *Leyla Sahin*, the Grand Chamber affirmed that *"where 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"*[55]. 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 civilisation–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, describing an original concept of secularism that respects the culture of society instead of being aggressive or stirring conflict.

State education according to the Grand Chamber

After setting the frame of its competence, 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 a presentation of the aims of State education, presented as a preliminary. The legal reasoning depends on the purpose. The Grand Chamber briefly recalled what the Convention really requires regarding State education before discussing the legal arguments.

To this aim, the Court first recalled that, according to its case-law, the setting of the curriculum falls within the competence of the Contracting States (GC § 62). 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",* but, contrary to what the Second Section maintained, this pluralism does not imply religious neutrality; it is not intrinsically relative. 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[56], 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"*. The Convention simply requires the State to ensure that *"information or knowledge included*

54 EComHR, 23 October 1990, *Darby v. Sweden*, Ap. 11581/85, § 45: *"A State Church system cannot in itself be considered to violate Article 9 (Art. 9) of the Convention"*.

55 ECHR, *Leyla Sahin*., above, § 109.

56 ECHR, 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Ap. 5095/71; 5920/72; 5926/72, §§ 50-53 ; ECHR, GC, 29 June 2007, *Folgerø*, Ap. 15472/02, § 84, and ECHR, 9 October 2007, *Hasan and Eylem Zengin v. Turkey*, Ap. 1448/04, §§ 51-52.

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" (GC § 62). This prohibition not only concerns the curriculum, but also all the functions of the State with regard to education and teaching[57], including the setting of the school environment (§ 62).

The duties thus described by the Grand Chamber are above the determination of the secular or confessional character of State schools. They concern both systems equally. Neither secular systems nor those which recognise some religious dimension in State-education are contrary to the Convention. For example, in Liechtenstein, the State co-operates with the Church and parents in order to transmit a religious and moral education[58]. Consequently, State schools endeavour 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 the universal moral principles[59]. In the cantons of Saint Gall and Zurich, the curriculum relies on Christian principles.
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 the concepts of secularism and confessional neutrality 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.

The Court first explained that the obligation incumbent on States under Article 2 of Protocol 1 concerns not only the curriculum, but also concerns the organisation of the State school environment[60] (GC § 63). 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 the education and teaching of their children in conformity with their own religious and philosophical convictions. Then the Court recognised that the crucifix is *"above all a religious symbol"* (GC § 66). As such, it could possibly infringe the religious rights of parents through its impact on the children education.

The crucifix: a passive symbol
Contrary to the Section 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 it was *"an essentially passive symbol"* (GC § 72).

---

57 ECHR, *Kjeldsen, Busk Madsen and Pedersen*, above, § 50, ECHR, 18 December 1996, *Valsamis v. Greece*, Ap. 21787/93, § 27, and *Hasan and Eylem Zengin*, above, § 49, and *Folgerø*, above, § 84.
58 Constitution of Liechtenstein, art. 15..
59 Preamble of the Polish law of 1991 on education.
60 The Court refers to the above mentioned cases of *Kjeldsen, Busk Madsen and Pedersen*, § 50 ; *Valsamis v. Greece*, § 27 ; *Hasan and Eylem Zengin*, § 49, and *Folgerø*, § 84.

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"* (2nd S. § 73). 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 (2nd S. §§ 53-56). 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 observations, 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[61], which 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. Moreover, it is not linked to school curricula. There lies its passivity. 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"* (GC § 72).

I think the concept of "passive symbol" is not contradictory with that of "powerful external symbols", although it is often affirmed. 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 active symbol, since it represents the nation and (sometimes) requires from those who hear it to stand with their hands on their hearts and to sing. On the other hand, a "weak external symbol" may be a religious jewel worn around one's neck–David's star, cross or Fatima's hand–the impact of which is weak on other people.

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 a crucifix definitely varies between Florence and Ankara.

No interference by the State

Acknowledging the symbol was passive was sufficient for the Court to rule that crucifix's impact was too substantially 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 in addition that the applicants had not proved there was any impact, whether on the pupils or on their mother.

61 ECHR, GC, *Buscarini and others v. San-Marino*, above.

Concerning the pupils, the Grand Chamber noted that,

> *[t]here 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.*

Towards their mother, the impact of the crucifix is 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"* (GC § 66).

The Grand Chamber also rejected the *"emotional disturbance"* claimed by the applicant that the Section recognized. It is only a *"subjective perception"*, which is not in itself sufficient to establish a breach of Article 2 of Protocol 1. The Convention does not protect our 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 the application is inadmissible *ratione materiae*. 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 been so if the *Lautsi* case had been an ordinary case[62].

The reference the Section made to the potential risk of emotional disturbance to the pupils because of the crucifix 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. This prejudice was purely putative, hypothetical, and required this presupposition: 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[63]. 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 more than insufficient to constitute an infringement of the pupils' conscience and 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

---

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

63 "*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"* Lautsi 2nd S. §50).

such cases, the Court did not consider that such an emotional disturbance could violate parents' rights. 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"*[64].

The slight impact of the crucifix is the real *ratio decidendi*. After this statement, the Court could have abstained from going further. However, considering the proportions taken by this case, it had become politically inconceivable that the Court could find the case inadmissible. 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, that is to say, concerning the freedom of religion of the children.

Some commentators criticised the Court for having examined the case mainly through the right of parents, and not to have proceeded to a thorough examination of the case under Article 9, thinking such an examination could have led to a different result.

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[65] when the dispute concerns the obligation to respect the convictions of parents in education and teaching (GC § 59).

I agree with the Court that, 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 that this provision has no independent existence and only concerns the enjoyment of the rights guaranteed by the Convention. The Court also noted that no distinct question arose that was not already examined. Moreover, the applicants did not substantiate this complaint.

---

64 ECHR, *Kjeldsen and others*, above, § 54.
65 ECHR, GC, *Folgerø and others v. Norway,* above, § 84.

III. Supplementary comments in the Grand Chamber judgment

Since the applicants failed to prove State interference with their rights claimed, 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.

The Crucifix and the Islamic headscarf

To back up its assertion, the Second Section referenced the judgment in *Dahlab v. Switzerland*[66] without more detail. This case concerned prohibiting a State school teacher from wearing an Islamic headscarf while teaching. The Court considered the headscarf to be a powerful external sign and ruled the prohibition was compatible with the Convention. On this basis, the Section, and some commentators, deduced that it was logical and even just to prohibit the display of crucifixes too.

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"* (GC § 73). The Grand Chamber clarifyied 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, without doubt, 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, and 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 they prevented from believing anything. They were not indoctrinated and did not suffer from any proselytism.

- In the *Dahlab* case, the Court considered that the will of the Swiss authorities to ensure the confessional 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.

---

66 ECHR, dec, *Dahlab v.Switzerland,* above.

However, the fact that the prohibition of a religious symbol is compatible with the Convention does not mean that the authorisation 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.

- Moreover, unlike Switzerland, Italian domestic law does not clearly enshrine secularism. Therefore, before the Court, the applicants cannot 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 (GC 74), 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, according to 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 leaves the meaning and the cultural context aside. The Court was explicit on the 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"*[67]. For the Court, this compatibility problem justified the headscarf prohibition in the non-confessional education system.

This compatibility issue did not arise in the *Lautsi* case, not because it is a crucifix. 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. The examination of the Court must only concern the concrete impact of the crucifix, this impact being partly determined by the crucifix's meaning.

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 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

67 *Idem.*

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*[68] concerning euthanasia.In that case, the Court refused to grant the applicant the benefit of an alleged "negative right to life". Moreover, in the present case, a negative freedom would concern a purely subjective matter: 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[69] was denounced by the Italian Government before the Grand Chamber as the main "scandal"in this 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!"* [70].

Bavarian non-solution

"The Bavarian solution" is an observation worth noting. After a decision of the German Federal Constitutional Court[71] that judged the presence of crucifixes in classrooms as *"contrary to the principle of the State's neutrality and difficult to reconcile with the freedom of religion of children who were not Catholics"* [72], the Bavarian Parliament adopted a new ordinance. This ordinance, known as the "Bavarian solution", provided for the possibility of parents to cite their convictions to challenging the presence of crucifixes in classrooms attended by their children. 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, several people wanted to focus the defence's argument on the fact that the decision to maintain the crucifix resulted from a vote by the school's governing body[73]. On 22 April and 27 May 2002, the applicants' request to remove the crucifix was discussed by the school's governing body. The governing body rejected the request, ten votes to two with one abstention. After this vote, the applicant suggested that the crucifix be removed during school holidays, which was also refused. 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

---

68 ECHR, 29 April 2002, *Pretty v. the United Kingdom*, Ap. 2346/02.
69 Pleading of the Italian Government before the Grand Chamber, 30 June 2010, § 24-26.
70 Pleading of the Italian Government before the Grand Chamber, 30 June 2010, § 4.
71 German Federal Constitutional Court, 16 May 1995, Kruzifix-decision, BVerfGE 93, 1.
72 According to the Court's presentation (*Lautsi* GC § 28).
73 This 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.

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"*. 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 favour of the secular ideology[74]. Any removal and implementing methods 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 [which] are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole"*, in the Court's own words[75].

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", was only a relative weakness of the argument, because the Court does not have the mission 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 automatic, 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 8 June 2010[76] in which the Registry requested that the Parties specify 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"*. In this letter, the Court drew the Parties' attention, especially the

---

74 Application of the Italian Government to the Grand Chamber, p. 11, §§ 22 et 23.
75 ECHR, 13 February 2003, *Refah Partisi (The Welfare Party) and others v. Turkey*, Ap. 41340/98, 41342/98, 41343/98 and 41344/98, § 99.
76 This document may be consulted at the Court's Registry.

Government's, to a possible end of the conflict. The Government decided to avoid this resolution and expressly requested the Court to judge the case on the merits.

The Grand Chamber judged the case on the merits, and it even ruled on issues which, in my opinion, were not necessary because finding no State interference was sufficient. The Grand Chamber carefully pursued clarifications on other controversial issues. For example, it specifically considered the State's ability to justify infringing Convention rights because of traditions and the majority religion.

Tradition

The Italian government and the intervening governments requested that the Court not abolish a cultural tradition. Beyond respect for ethnic diversity and even the "pluralism" of European cultures demanded by the Court, the real question raised here concerns 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 is very clear: though the decision to perpetuate a tradition in principle falls within the margin of appreciation of the defending 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"*. 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[77]. Even more, in some Islamic cases, the Court had the 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"*[78], it has concluded several times[79] *"that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention"*[80]. There lies a 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". These two notions are full of resources[81]. Invoking a tradition is not sufficient to justify it; the justification is tied to the margin of appreciation. Thus, in the *Dogru* case,

77 ECHR, *Buscarini and others v. San-Marino,* above.

78 ECHR, 26 September 1996, *Manoussakis v. Greece,* Ap. 18748/91, § 47.

79 ECHR, *Refah Partisi and others,* above, § 123 ; ECHR, 4 Dec. 2003, *Günduz v. Turkey*, Ap. 35071/97, § 51 ; ECHR, dec. 20 September 2005, *Güzel v. Turkey*. Ap. 54479/00 ; ECHR, Dec. 11 December 2006, *Kalifatstaat v. Germany*, Ap. 13828/04.

80 ECHR, *Refah Partisi and others,* above, § 123.

81 The Court began to give them some substance, especially with the cases of *Refah Partisi*, *Kalifatstaat, Leyla Şahin* and *Dahlab*. They relate to an evolutional concept of civil liberties, sex equality, pluralism, tolerance and broadmindedness.

the Court expressly stated that, *"[w]here 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"*[82]. Actually, secularism is also viewed by the Court as a national tradition. It is true that the French Republic considers itself as secular, culturally speaking, while other countries are culturally Catholic, Lutheran, or Orthodox.

The position of the Court has not changed on this aspect. 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.

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 summed up 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"* [83]. 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.

The Second Section accepted this logic, and blamed the Italian majority religion for being the majority religion,. The Secdond Section considered that *"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"* (§ 50).

Following the reasoning of the Section, the presence of the crucifix would be more

82 ECHR, 4 December 2008, *Dogru v. France,* Ap. 27058/05, § 63. Also ECHR, 4 December 2008, *Kervanci v. France,* Ap.31645/04.
83 According to the words of the applicant's counsel before the Grand Chamber.

acceptable if the majority of the population were not Catholic, which is absurd, as the Italian Government noted.

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 a minority. What appears implicitly 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. It is well known that the Recognition of the absolute character of individual dignity and autonomy leads to de-legitimating 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 concept, society is purely artificial and instrumental, at the service of the individual. An artificial instrument can have no *being* and even less conscience, but 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 from the *conduct* to the *nature* of society, freedom of religion becomes an efficient operational concept, a tool to secularise society.

This concept of freedom of religion, which secularises society through the shift from *conduct* to *nature* does not merely ignore, but finally reduces the religious dimension of social life and the social dimension of religion as much as possible[84]. Both these dimensions

84- *The social dimension of religion* is difficult to apprehend legally, 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

are natural and manifested through the majority.

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 by a change in paradigm: freedom of religion is no longer a primary, fundamental right directly stemming from the ontological dignity of the human person. 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 neutralised 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 equally good, the perspective now seems to have been reversed to the detriment of religion. Religions are 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 is now 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 to have a belief, but not to manifest it in public and collectively.

Confronted with this logic that identifies neutrality and secularism, and finally reduces religion to faith, and reduces freedom of religion to secularism, we tried to present the concept of neutrality to the Court as an inclusive concept, in opposition to secularism (which is exclusive by nature). We 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. Taking into account the religious dimension of culture should allow, under some conditions, for the

---

society itself constitutes a potential constraint.
- *The religious dimension of culture* is also difficult to apprehend for 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 neutralise the religious dimension of societies, and to empty the public arena of the free exercise of individual conscience. This neutralisation 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 recognised 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.

recognition of the legitimate interests that a society may have in preserving its culture, language, national heritage, and its socio-religious dimension. To that aim, we especially recalled that secularising the European public arena would contradict the Council of Europe project. 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 religious–of society as legitimate when examining the proportionality of an interference with the freedom of religion of an individual. 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 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"*. Granting *"a special status to some traditional churches (…) is not in itself contrary to the principle of equality"*. 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"* [85]; *"wiping out the de facto differences would be incompatible with the principle of neutrality in religious matters"* [86]. Thus, according to the Government's wish, taking the national socio-religious identity[87] into account, even if it is relative and evolutional 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"* (GC § 71), 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. 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 recognised that in countries with a Christian tradition, Christianity possesses a specific social legitimacy which distinguishes it from other religious and philosophical beliefs. This tradition justifies a differential approach. Because Italy is a country with a Christian tradition, the Christian symbol may legitimately have a preponderant visibility in

85 Application of the Italian Government to the Grand Chamber, §8.
86 *Idem*.
87 *ibidem*, p. 8, § 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"*.

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"* [88]. Similarly, in the famous case of *Otto-Preminger Institute v. Austria*[89], the Court did not disregard the fact that Catholicism is the religion of an overwhelming majority of Tyroleans. Actually, the European judge has long been attentive to relative and specific factors such as the national *"moral climate"*[90], *"tradition"*[91], *"cultural traditions"*[92], the *"historical and political factors peculiar to each State"*[93], the *"specificity of the religious issue"* [94] in a given country, or the *"historical and cultural traditions of each society"* in areas concerning the *"deep convictions"* of society[95]. 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"*[96].

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.

Political and religious debate

The Section's judgment was greatly blamed for having turned religious freedom against religion, and claiming to defend religion while wiping it out of society. It is true. Nonetheless, this reproof was not entirely justified, because it must be admitted that, in ruling in favour of the prohibition of the crucifix, the concept of religious freedom took up its original expression: opposition to State religion. In giving at least the appearance of its original anti-religious back to freedom of religion, the Court broke the compromise between Catholicism and modernity, which has been expressed mainly through the Declaration *Dignitatis Humanae*[97]. 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

88 ECHR, 28 November 2004, *Zengin v. Turkey*, Ap. 46928/99, § 63 (unofficial translation).
89 ECHR, 20 September 1994, Ap. 13470/87 § 56.
90 ECHR, 22 October 1981, *Dudgeon v. the United Kingdom*, Ap. 7525/76, A 45 § 57.
91 ECHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, above.
92 ECHR, 24 February 1994, *Casado Coca v. Spain*, n° 15450/89, n° 285, § 54.
93 ECHR, 1st July 1997, *Gitonas and others v. Greece*, Ap. 18747/91 ; 19376/92 ; 19379/92 ; 28208/95 ; 27755/95, § 39.
94 ECHR, 10 July 2003, *Murphy v. Ireland,* Ap. 44179/98 (Case relating to a minister interdicted from publishing an advertisement with a religious aim on a local radio) (free translation).
95 ECHR, 18 December 1987, *F. v. Switzerland*, n° 11329/85, § 33. *See also* the Grand Chamber judgment of 16 December 2010 *A. B. and C. v. Ireland,* Ap. *25579/05* relating to abortion.
96 ECHR, 12 April 1991, *Otto-Preminger-Institute v. Austria*, Ap.13470/87, § 50.
97 Council Vatican II, Declaration on religious freedom *Dignitatis Humanae*, 7 December 1965.

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 this 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. Actually, its nature makes it impossible to distinguish between religions and ideologies because no alleged truth can prevail over individual freedom. Since it makes the freedom of one person prevail over the "truth" of the group, freedom of religion constitutes an efficient tool to secularise 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 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 the declaration *Dignitatis Humanae* tackles this aspect. The object of Declaration *Dignitatis humanae* is to recognise 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. This declaration was broadly interpreted as implying that Catholic States renounce their confessional character. Actually, several Catholic states, such as Spain, modified their constitutions to that 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"* [98]. It is true that the Declaration considered this case in order to demand *"that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice"*. 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.

This declaration caused a lot of debate. According to Archbishop Roland Minnerath[99], the

---

98 *Declaration*, § 6, extract : *"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".

99 Roland Minnerath, *Le droit de l'Eglise à la liberté, du syllabus à Vatican II*, Coll. Le point théologique,

theological evolution of the Catholic Church on religious freedom comes in particular from a change in its concept of the State. He analyses the declaration *Dignitatis Humanae* as confirming the relinquishing of the concept of the "society-State"–seen as a natural emanation of society–in favour of a functional and instrumental concept of the State. 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. Actually, many declarations seemed to substantiate the idea that the Church, with Council Vatican II, had accepted (if not endorsed) secularism and its presuppositions. In addition, the attention visibly focused on "the person" rather than society, and its ultimate aim, as well as the founding of religious freedom in individual dignity and conscience, make expressing a discourse on the primacy of the common good and on society particularly difficult.

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 *person*, which comes along with the disappearance of the very possibility of a substantial common good. The disappearance of this possibility of substantial common good, in turn, explains that, in correlation with the vanishing of the society-State in favour of the functional-rule-of-law, liberal-democracy has replaced Christian-democracy as 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*[100] in 2003. In a way, the *Lautsi* case was the opportunity for Catholics, Orthodox, and some Protestants, including Evangelicals, to clarify their concept of religious freedom

Among the declarations of Benedict XVI during the crucifix case, we can especially mention that of 15 August 2005, when he recalled that *"In public life, it is important that God be present, for example, through the cross on public buildings"*[101]. On 5 June 2010, just

---

Beauchesne, Paris, 1997.

[100] Post-Synodal Apostolic Exhortation *Ecclesia In Europa* 28 June 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 deplores every type of ideological secularism or hostile separation between civil institutions and religious confessions"*. He went on, insisting on "*healthy cooperation between the ecclesial community and political society »*.

101 Homily of Pope Benedict XVI, pontifical parish, Castel Gandolfo, 15 August 2005. This took place after the judgment of the Veneto administrative Court in favour of the crucifix of 17 March 2005.

a few weeks before the hearing before the Grand Chamber, the Holy Father recalled that *"The 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"*[102]. On 12 June 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*[103]*.*

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*[104]. The Pope explains that, due to the link between religious and moral freedom, *"Religious 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"*. In the same way, he says that *"A freedom which is hostile or indifferent to God becomes self-negating and does not guarantee full respect for others"*. 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 eclipse the public role of religion is to create a society which is unjust"*.

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*

---

102 Homily of Pope Benedict XVI, Church of the Holy Cross, Nicosia, 5 June 2010.

103 Address to the participants of the 45th Joint Meeting of the Council of Europe Development Bank, Rome, 12 June 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.

104 Benedict XVI, *Religious Freedom, the Path to Peace*, Message for the World Day of Peace, Rome, 1st January 2011.

of many nations are cut"[105].

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[106]. It could even be the opposite: religious freedom could exclude neutrality if one considers that religious freedom has a collective dimension and is correlated to the common good.

The present disintegration of societies, witnessed especially in Western countries, as well as the globalisation 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 favour of the crucifix as a fundamental symbol of the civilisation takes all its worth. Italy, while resolutely desiring to respect individual liberties, refused to sink into postmodern cultural nihilism. Italian Ambassador Sergio Busetto expressed it as follows: *"Respecting the religious identity of an individual must be possible while respecting the religious identity of the society in which he lives"* [107].

The declarations of Orthodox countries in favour 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 (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[108], Patriarch Kirill of Moscow and all Russia declared: *"European democracy should not encourage Christanophobia like atheistic regimes did in the past"*. 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.(...) The 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"*.

Even more directly, the representative of the Russian Orthodox Church to the OSCE declared, 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*

105 Benedict XVI, *New Year Address to the Diplomatic Corps*, Rome, 11 January 2011.
106 In the Encyclical *Mater et Magistra* of 15 May 1961, John XXIII denounced the modern era: *"The 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"*.
107 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, 30 April 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
108 Letter to the Italian Prime Minister, 26 November 2009. Available at: http://www.mospat.ru/en/2009/11/26/news9194/

religiously-neutral state in Europe have many negative implications"[109].

It is obvious that the scandal caused by the November 2009 *Lautsi* judgment freed many political and religious leaders to speak against what has often been perceived as an unacceptable ideological abuse of the Court. The judgments of the Court are not directly enforceable. 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 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.

The consequences of the* Lautsi *case

The consequences of the *Lautsi* case are going beyond the issue of secularism. This concerned the underlying values of the Convention. These consequences are already apparent in recent case-law: The Court seems to have begun to manifest a certain judicial reserve in morally sensitive issues. While the Court had become one of the favourite playgrounds of "ultra-liberal ideological"[110] 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. This was the case, for example, in *Schalk and Kopf v. Germany*[111]. In that case, the Court ruled there was no right for same sex couples to marry. Additionally, in the significant judgment of *A. B. and C. v. Ireland*[112], the Grand Chamber expressly stated that there is no right to abortion under the Convention[113]. Further, in the case of *Hass v. Switzerland*[114] the Court ruled there was no right to assisted suicide. 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*[115], 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. This trend has been

---

109 Vakhtang Kipshidze, Department for the External Church Relations, of the Russian Orthodox Church during the Supplementary Human Dimension Meeting on Freedom of Religion or Belief of the OSCE, Vienna, 9-10 December 2010
Available at: http://www.mospat.ru/en/2010/12/13/news32334/

110 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 about the *Lautsi* case, 27 November 2009.

111 ECHR, 24 June 2010, *Schalk and Kopf v. Germany*, Ap. 30141/04.

112 ECHR GC, *A. B. and C. v. Ireland*, above.

113 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"*.

114 ECHR, 20 January 2011, *Hass v. Switzerland*, Ap. 31322/07.

115 ECHR 17 February 2011, *Wasmuth v. Germany,* Ap 12884/03.

confirmed with the recent ruling in *S H and others v. Austria*[116]. In this case concerning the ban of techniques of artificial procreation with sperm or ova donations, the Grand Chamber has once 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. It also confirms that the sensitive moral questions raised by IVF can legitimately be taken into consideration by national legislators. Italy, Germany, as well as the ECLJ intervened also 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 Austrian Switzerland, Spain, Quebec, and Romania. The constitutional courts of Austria and even Peru 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 22 June 2011 the Supreme administrative Court rejected an application aimed at banning the display of the crucifix in the corridors of a Ticino school. 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[117].

More fundamentally, the crucifix case has 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–about which both rejoiced–helps them regain a legitimate influence and thus modify the orientation of European policy in depth. In the long term, this could be the major consequence of the crucifix case.

Since then, other applications have been presented to the Court, one about the presence of icons in Romanian classrooms, and another about crucifixes in Italian courts.

116 ECHR, GC, 3 Novembre 2011, *S. H. and others v. Austria*, Ap n°. 57813/00

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