

Religion and the State: the 'Lautsi' Case of the European Court of Human Rights About Crucifixes in Italian Class Rooms

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A. Introduction¹

The relationship between political authorities and religious communities is complex and controversial. One area where the tensions are evident is in public education. A central task of public authorities is to ensure the education and socialisation of children to become well informed and responsible citizens with a sense of justice. The children must on the one hand appreciate the history and past culture of their society, and at the same time be prepared for their present and future multi-cultural society. Tensions between these objectives are visible when the state seeks to include or exclude contested religious symbols and teachings within the public educational system. The European Court of Human Rights (ECtHR, 'the Court') has been brought in to address and resolve some of these issues, insofar as they fall under relevant paragraphs of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

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The ECtHR track record may seem inconsistent. It has restricted religious teaching in textbooks² allowed Turkey to prohibit students from wearing religious headscarves at university³, allowed Switzerland to prohibit primary school teachers from wearing headscarves⁴, and allows Italy to require crucifixes on school walls – after first denying Italy that authority⁵.

There are several ways to try to make some sense of this cluster of decisions. The explanation which will be addressed here is the ECtHR's practice to grant states a 'Margin of Appreciation' (MA). Other approaches merit mention, only to leave them aside here: One is to look closely at the various rights and vulnerabilities at stake: the rights of the school authorities vs those of parents, or the teacher's right to freedom of expression vs parents' rights, etc. Alternatively, one could elaborate on the distinctions and relations between the public sphere, universities and compulsory public schools. Yet another approach may be to explore the presumed different impacts of statements in schoolbooks intended to influence beliefs explicitly, versus 'passive' crucifixes on school room walls in societies where such symbols are not perceived as salient, versus teachers wearing head scarves in communities where this is experienced as unusual.⁶

The Court's practice of a 'Margin of Appreciation' occurs when the Court gives states some but not full discretion to decide whether they are in compliance with their treaty obligations. This typically concerns questions whether states are justified in violating some individuals' rights because the violations are 'proportionate' to acceptable social objectives - or other human rights.

Many may argue that international or regional courts and treaty bodies should be particularly hesitant in reviewing the legislation of well functioning democracies, out of respect for the citizens' autonomy.⁷

2 See *Folgero v. Norway*, 2007.

3 See *Leyla Sahin v. Turkey*, 2004.

4 See *Dahlab v. Switzerland*, 2001.

5 See *Lautsi v. Italy I*, 2009 & *Lautsi v Italy II*, 2011.

6 I owe these points to Jan Harald Alnes, Annamari Vitikainen and Claudio Corradetti.

7 Note that criticism of the ECtHR that it interferes in 'political' issues is misplaced: the objective of the treaty and its court has clearly been to limit legislation and other state decisions that violate the Convention. Thus, the Italian government's argument in this regard concerning the Lautsi case seems mistaken when it held that "The Government did not contend that it was necessary, advisable or desirable to keep crucifixes in classrooms, but that the decision

Indeed, the rampant value pluralism and variations in natural and social conditions across states counsels a certain leeway concerning how states should best respect and promote various objectives – including human rights. Thus, one explanation of the pattern of decisions by the Court with regard to religion in the class room is that it has declined to overturn several of the national laws or regulations in the cases mentioned.

Critics often challenge the Court’s application of a MA as being inconsistent⁸.

To explore these worries, this article seeks to bring a more precise MA doctrine to bear on the Lautsi case concerning crucifixes on school walls, to assess whether the ECtHR decision and doctrine withstands criticism that it is too vague, or that it is poorly applied in this particular case. The case is one where privacy and family life is at stake, thus an area where scholars claim that the Court usually applies a heightened standard of scrutiny⁹. Was this the case in the Lautsi case, and if not, what should the Court have done?

The focus of this article is not to deny that there are other criticisms of the first Lautsi decision – which required crucifixes to be taken down – and the second Lautsi decision which permits them. Such criticisms merit attention – some of which has been presented by others¹⁰.

whether to keep them there was a political one and therefore one to be taken on the basis of what was expedient, rather than according to legal considerations.” (Lautsi I (2009)) Thus Lautsi II (2011): 68. The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that 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.

8 See Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards,” 1999, pp. 843-44; Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law,” 2005; Del Moral 2006, “The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine,” p. 621; Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 1996.

9 See Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 2001.

10 See Zucca, “Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber,” 2013, doi:10.1093/icon/mos008; Smet, “Lautsi v. Italy: The Argument from Neutrality,” 2011, at <https://strasbourgobservers.com/2011/03/22/lautsi-v-italy-the-argument-from-neutrality/>.

The first section presents the Lautsi case, the following sections attend to various elements of the MA doctrine of the court. We return at the end to consider whether critics of the MA doctrine are right.

B. Lautsi

The Lautsi case concerns complaints by a parent (Mrs Soile Lautsi) who challenged Italy's administrative law requiring display of the crucifix in every State school classroom. She held that this violated the right of parents to "to ensure [their children's education] in conformity with their own religious and philosophical convictions" (Article 2 of Protocol 1 to the ECHR). Mrs Lautsi pointed out that crucifixes in rooms used as polling stations for voting in political elections had already been found in violation of the principle of a secular state¹¹.

Italy argued to the contrary that "the cross had become one of the secular values of the Italian Constitution and represented the values of civilian life". "The democratic values of today are rooted in . . . the Gospel message. The message of the cross would be a humanist message, which could be read independently of its religious dimension, consisting of a set of principles and values that form the basis of our democracies." Therefore "the display of the cross does not undermine the secular state", and since "there is no European consensus on how in practice to interpret the concept of secularism . . . states should have a wider discretion in the matter."

C. The Margin of Appreciation

Skeptics object that the MA doctrine is too vague: it is hardly a "doctrine" in the sense of a principle or position that forms part of a legal system.¹²

11 See ref. Ronchi.

12 One reason that is put forward for an MA is the respect for democratically accountable decisions. However, we should note that this is not obvious in this case. Judge Malinverni, in a dissenting opinion to Lautsi II, noted that. "With regard to the regulations governing this question, I would point out in passing that the presence of crucifixes in Italian State schools has an extremely weak basis in law: a very old royal decree dating back to 1860, then a fascist circular of 1922, and then royal decrees of 1924 and 1928.

One concern is that the vague MA doctrine leaves too much discretion to the judges who may be tempted to treat states differently. In particular, the procedure to determine an “emerging common practice” – or “some abstract sense of common standards” is exceedingly opaque – sometimes also contested by the participating judges.¹³

A more precise MA doctrine could specify how to determine whether there is a 'common practice', in particular whether to only include legislation and stated policies, or also include practices of permitting a practice which is technically not legal, and a minimum threshold, for instance 60% of states, to maintain that there is a consensus. Still, such improvements do not avoid other objections: that such discretion entails a failure of the ECtHR to protect human rights in the short and long run. The Court thereby “side-step[s] its responsibility as the ultimate interpretative authority in the Convention system.”¹⁴ Indeed, “[t]he essence of the international control mechanism may evaporate if there is in fact no effective check upon national power”¹⁵

Of central concern here is that when the ECtHR discusses the MA, the general issue is whether there is ‘proportionality’ or ‘fair balance’ between the means a state chooses and the aim sought (1986, 50). Discretion might be granted with regard to at least five different elements of the ‘proportionality test’ as developed in later cases and by various authors. As part of this decision the Court assesses

1. The legitimacy of the social objective pursued
2. How important the restricted/derogated right is, e.g., as a foundation of a democratic society.
3. How invasive the proposed interference will be.
4. Whether the restriction of the right is necessary.
5. Whether the reasons offered by the national authorities are relevant and sufficient.

For each of these, the Court may grant the state a narrow or broad MA. Note that some of these factors may well change over time in light of experiences about what rights are necessary for a ‘democratic society’¹⁶,

13 See Rasmussen v. Denmark 1984, para 40, xv. United Kingdom 1997, 13; cf. Brems 1996, p. 248.

14 Yourow, 1996, p. 181.

15 Yourow, 1996, p. 181; cf z v. Finland 1998.

16 Arts. 8-19, del Moral 2006, p. 613.

or concerning realistic alternative policies. The following sections address each of these factors.

D. The Legitimacy of the Social Objective Pursued

The issue at stake is the interest of the state to pursue its educational objectives through the curriculum and teaching environment of the public schools.

Public education contributes in important ways to a sustainable and legitimate society: it surely prepares students to be full and equal citizens – but what is required, and what is permitted regarding the teaching of religions and values? Clearly, in order to navigate within several European societies, all citizens must know a bit about Christian culture as it has shaped institutions, discourse, and everyday phrases – ‘to be a good Samaritan’, ‘to turn the other cheek’. But Christianity is also a set of religions, with beliefs about the supernatural and norms about human morality that are worthy of respect, but not shared by every reflective and honourable citizen.

Three important elements are worth noting:

1. Issue: not ‘Public Sphere’ but Public Schools

The social interest at stake in the Lautsi case – and the policy that is challenged – is not the presentation of religious symbols in the ‘public square’ or in the ‘public sphere’ or in ‘public life’ more generally. Rather, the concern is about crucifixes in the public schools, attendance to which is obligatory, and whose role is to educate citizens. This distinction has been overlooked in some of the discussions.¹⁷

2. Public Education About Religion is not Prohibited, but Should be Objective, Critical, and Pluralistic.

The Court allows religious teaching in schools, but insists that it must be objective and pluralistic.¹⁸

The Government¹⁹ seems to justify the obligation to display the crucifix by referring to the positive moral message moral of Christian faith. This

17 See Weiler, 2010a.

18 See e.g. Folgero v. Norway, 2008.

message is said to transcend secular constitutional values, concerning the role of religion in Italian history and to the deep roots of religion in the country's tradition.

The Court did not accept this argument as sufficient grounds to grant the Italian state a Margin of Appreciation on this issue, and thus apparently did not accept that the crucifix is part of an objective, critical and pluralistic religious education. In particular, the Court disputed the government's claims about the 'secular' symbolism of the crucifix:

The Government²⁰ justified the obligation to display (or the fact of displaying) the crucifix by referring to the positive moral message of Christian faith, which transcended secular constitutional values, to the role of religion in Italian history and to the deep roots of religion in the country's tradition. They attributed to the crucifix a neutral and secular meaning with reference to Italian history and tradition, which were closely bound up with Christianity. They submitted that the crucifix was a religious symbol but one which could equally represent other values.²¹

In the Court's opinion, the symbol of the crucifix has a number of meanings among which the religious meaning is predominant.²²

The Grand Chamber joined other parties in dismissing claims by the government that the crucifix in this setting should not be regarded as a religious symbol: "The Court further considers that the crucifix is above all a religious symbol."²³

3. What are State's Objectives When Requiring Crucifixes on the School Walls?

It remains very difficult to understand the state's objectives in requiring crucifixes as not including a concern to favour the Catholic religion. A variety of appropriate objectives concerning the dissemination of national culture and history can be secured by several other means. Note that this point is also granted by some who have criticized the Lautsi I judgment: Weiler remarks that:

19 See Lautsi I, p. 34-44.

20 See paragraphs 34-44 above.

21 See Citing "The Veneto Regional Administrative Court's judgment" 2005, §16 & §13.

22 See Lautsi II, p.51.

23 Lautsi II, p. 66.

By this reasoning, Ms. Lautsi is perhaps entitled to her damages because the Italian government failed to demonstrate that the use of religious symbology in its classroom was part of a credible programme of education for tolerance and mutual respect. It is that which should be the guideline and constitutional imperative of contemporary Europe.²⁴

E. How Important the Restricted/Derogated Right is

The right to education is protected by article 2 of protocol 1:

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 the parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

It is difficult to determine how important this right is, but both this and the right to family life appear to be threatened or violated in the Lautsi case. What is at stake is precisely that the state's education efforts are at odds with the parents' religious and philosophical convictions concerning how the school displays the crucifix. Several authors note that the ECtHR should not grant a broad MA of appreciation to the rights of minorities that are at risk by majoritarian decision-making.²⁵ The *latter* does seem to be at stake here.

Note that the right to education does not prohibit all teaching of religion, but that this education must be 'objective.' It

F. How Invasive the Proposed Interference Will be

This particular issue is controversial. The Italian government appears to have held that the Crucifix was not primarily a religious symbol at all, so did not raise an issue. The Grand Chamber rejected this argument, - as did various Catholic and Christian organizations.²⁶

²⁴ Weiler, 2010a.

²⁵ E.g. Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' 31 *International law and politics* (1999), 843-854, at 853

²⁶ See Lautsi II, p. 9.

The Court held that the display was religious in nature, yet rejected unsubstantiated claims by Mrs Lautsi that it had a noticeable impact on children:

There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed....However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. 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.

The Court here seems on the verge of an inconsistency with its rejection of the Dahlab case. The Swiss ban on Muslim teachers wearing headscarves while teaching was justified in order to 'protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law'.²⁷ In this case the Court regarded headscarves as 'a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion'²⁸. It went on to claim that:

"[t]he Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect."²⁹

It is not easy to understand how a headscarf can be a more powerful symbol, nor why the burden of proof shifts according to the governments' preferred position between Dahlab and Lautsi. One possible – but problematic – explanation may be that in the former case the religion of concern was one of a minority, while in the latter case it was one of the majority. Another possibility is that under such circumstances of

²⁷ See Lautsi II para 73.

²⁸ Dahlab v. Switzerland Appl No. 42393/98 (15 February 2001), 2-3.

²⁹ Ibid - Dahlab v. Switzerland

uncertainty the Court grants the state a broader MA – though the right at stake concerns minorities.

G. Whether the Restriction of the Right is Necessary

A central issue here concerns what alternative policies are available to the state that might avoid all rights violations of a similar weight. There are at least three central issues worth considering related to the Lautsi case.

I. Are Crucifixes Necessary?

Firstly, it is not clear from the state's arguments that crucifixes on the school room walls are at all necessary to achieve the legitimate objectives of public education. To the contrary, according to the Court:

The Government did not contend that it was necessary, advisable or desirable to keep crucifixes in classrooms, but that the decision whether to keep them there was a political one and therefore one to be taken on the basis of what was expedient, rather than according to legal considerations.³⁰ It would be a mistake to assume that the fact that the decision was a political one does not reduce the conflict between the ECHR rights and the particular policy. Other symbols of 'secularism' would seem less objectionable; as might other symbols of the historical impact of the Catholic church on Italian life.

II. Did the State Consider Less Rights-Infringing Alternatives?

Secondly, even if crucifixes were regarded as a required component of public education, there is little evidence that the state considered other less burdensome alternatives. For instance, it appears that Bavaria maintains similar practices but allows parents to challenge the practice in particular school rooms. – this opportunity for parents was introduced after the Federal Constitutional Court struck down a previous Bavarian school law.³¹

30 See Lautsi II, p. 42.

31 See Zucca, 2013. I am grateful to an anonymous referee for the information about why the Bavarian legislation was changed.

III. Will all Alternatives Violate Some Citizens' Human Rights?

Thirdly, a more complex issue, is whether all alternatives will violate other citizens' similar rights with regard to their world view.

Will any Crucifix policy violate objectivity? The state – and Joseph Weiler, and at least some of the judges of the ECtHR³²– seems to assume that ‘secularism’ is on a par with Christianity. The Lautsi I Court held that: The State's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.³³

Weiler claimed that: The position adopted by the Chamber is not an expression of the pluralism manifest by the Convention system, but an expression of the values of the *laïque* State. To extend it to the entire Convention system would represent, with great respect, the Americanization of Europe. Americanization in two respects: First a single and unique rule for everyone, and second, a rigid, American style, separation of Church and State, as if the people of those Members whose State identity is not *laïque*, cannot be trusted to live by the principles of tolerance and pluralism. That again, is not Europe.³⁴

The Grand Chamber noted that: In the Government's view, neutrality meant that States should refrain from promoting not only a particular religion but also atheism, “secularism” on the State's part being no less problematic than proselytising by the State. The Chamber's judgment was thus based on a misunderstanding and amounted to favouring an irreligious or antireligious approach of which the applicant, as a member of the Union of atheists and rationalist agnostics, was asserted to be a militant supporter.³⁵

Some hold that “secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology among others”³⁶. On this view, to require the removal of crucifixes amounts to the same sort of endorsement of a particular conception of the good life, a competitor to religious world views.

I submit that this is a mistake.³⁷ There are certainly secular comprehensive conceptions of the good life that deny the existence of

32 See Bonello, 2.10 & Power, pp. 44-45.

33 See Lautsi I, p. 47.

34 See Weiler 2010b, p.17.

35 See Lautsi II, p. 35.

36 Power.

37 See cf. Kyritsis & Tsakyrakis, 2013.

transcendent beings, just as there are comprehensive liberal views that cherish individual autonomy.³⁸

But there are political theories that seek to elaborate standards for justifiable policies precisely where citizens have different such comprehensive views. Some such contributions are known as ‘political liberalism’,³⁹ others use the term ‘constitutional secularism’⁴⁰ about standards appropriate for the constitutional essentials’ of a state committed to treat all on a footing of equality, respecting all citizens’ status as free and equally participant in a society regarded as a fair scheme of social cooperation. That perspective on the constitution and the central institutions of a state may be better characterized as agnostic than atheistic:

There is, or need be, no war between religion and democracy. In this respect political liberalism is sharply different from and rejects Enlightenment Liberalism, which historically attacked orthodox Christianity.⁴¹

Note that this ‘constitutional neutrality’ – at least the version argued by Rawls – is limited in scope – and hence is not a full ‘alternative’ to a world view. It only concerns the basic structure of society – its constitution and central institutions – such as schools. The institutions of the basic structure must be “framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints.”⁴² This account will entail that it is impermissible to display crucifixes in courtrooms, polling stations – and presumably public primary schools.⁴³ Other aspects – such as symbols of national identity – flags etc – or other appearances of religion in the public sphere would not obviously be part of this, so Weiler’s objection would not hold against this account:

In the cultural, social and political circumstance of Europe today one does not want to win on such ground – because it implies that if a symbol still maintains its religious significance, it has no place in the public square. That cannot be a correct reflection of the European constitutional sensibility.⁴⁴

38 See Mill, 1978 & Kant, 1980.

39 Rawls 1993.

40 Zucca 2013.

41 See Rawls, 1999, p.176.

42 Rawls, 1978, p.55.

43 See Kyritsis and Tsakyrakis 2013, p. 210.

44 See Weiler, 2013.

A second point is that the required ‘neutrality’ need not be one of *effects*, but of *aims*. Neutrality of aim rules out legislation that is “intended to favor any particular comprehensive view”⁴⁵– and instead insists that such rules must be justified based on premises that are acceptable to all, regardless of their reasonable comprehensive conception of the good.

I submit that this version of neutrality may be a suitable reinterpretation of the ECtHR’s claim in *Lautsi I*, that: The State's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.⁴⁶

So the government’s interpretation is mistaken and unfortunate, and the Court’s ruling is unfortunate.

H. Whether the Reasons Offered by the National Authorities are Relevant and Sufficient

The possibility of ‘constitutional neutrality’ suggests that the Italian government did not consider plausible alternatives. Furthermore, I submit that the state did not offer convincing arguments why hanging crucifixes was necessary for disseminating Italy’s history and values. It did not discuss any alternatives as required by the proportionality test. Moreover, the government’s claim that crucifixes are a non-religious symbol of the secular state seems implausible. Of course, if the crucifix did not convey uniquely catholic values, there would be no problem. This argument appears specious, and was not accepted by the Grand Chamber.

The Administrative Court held *inter alia* that. Moreover, with the benefit of hindsight, it is easy to identify in the constant central core of Christian faith, despite the inquisition, despite anti-Semitism and despite the crusades, the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State.⁴⁷

In *Lautsi II*, Catholic groups conceded this point: The non-governmental organisations *Zentralkomitee der deutschen Katholiken*, *Semaines sociales de France* and *Associazioni cristiane lavoratori italiani*....stated that they agreed with the Chamber that, whilst the crucifix

45 Rawls 1993, p.197.

46 See *Lautsi I*, p.47.

47 See *Lautsi II*, 11.6.

had a plural meaning, it was primarily the central symbol of Christianity. They added, however, that they disagreed with its conclusion, and found it difficult to understand how the presence of crucifixes in classrooms could be “emotionally disturbing” for some pupils or hinder the development of their critical thinking. In their submission, that presence alone could not be equated with a religious or philosophical message; it should rather be interpreted as a passive way of conveying basic moral values.⁴⁸

I. Concluding Assessment

Leaving aside the substantive issue – whether crucifixes on public school walls aviolate the ECHR – let us briefly return to consider whether this decision should be taken by ECtHR or by the Italian authorities. On the basis of the discussion above, I conclude that the ECtHR should not have granted Italy a margin of appreciation in this case, on the basis of the policy the Court itself has laid out. Italy’s arguments fail on several points of the proportionality test. This case seems to confirm the criticism that the Court’s granting of a MA is inconsistent.⁴⁹ Some might argue that this supports a general conclusion that the MA practice should be abolished. I submit that we should instead use this and other cases to explore how the practice may be developed even further, to ensure that the Court contributes to strengthen domestic protections of human rights in Europe.

48 See *Lautsi II*, p. 9.

49 See Benvenuti 1999, pp. 843-44; Brauch 2005, del Moral 2006, p. 621; Yourow, 1996.

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