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When Human Rights Have Gone Too Far: Religious Tradition and Equality in *Lautsi v. Italy*

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When Human Rights Have Gone Too Far: Religious Tradition and Equality in Lautsi v. Italy

Cover Page Footnote

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When Human Rights Have Gone too Far: Religious Tradition and Equality in *Lautsi v. Italy*¹

Rob Lamb†

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I. Introduction

On November 9, 2009, the European Court of Human Rights

¹ *Lautsi v. Italy*, App. No. 30814/06, EUR. CT. H.R. (Nov. 3, 2009), <http://www.echr.coe.int/echr/en/hudoc>. This decision was reversed as this note was set to go to print. The reversal is addressed in the final section of the article; given the circumstances, the article largely refers to and cites the 2009 decision; the facts and law addressed in the reversal remain unchanged, however.

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(hereinafter “ECHR”) made a decision that sent shockwaves through the various European nations over which it presides.² It decided that the Italian Republic, home to the Vatican and heir to the Holy Roman Empire, was violating the human rights of its citizens by displaying crucifixes in its state schools.³ The Italian government immediately renounced the decision, stating that its sovereignty was being challenged by the court.⁴ The Vatican chastised political leaders for promoting secularism over morality, and hundreds of individual voices erupted from the social network ether to declare that they opposed the decision of the ECHR.⁵ Italy was joined by ten European nations, thirty-three members of the European Parliament, and several non-governmental organizations⁶ in its appeal of the case to the Grand Chamber, granted in March 2010.⁷ Ultimately the political strength of these many voices won out, as the Grand Chamber overturned the original decision 15-2.⁸ The reversal rested not in law, but in politics, as the majority ceded its authority to decide the issue to Italian state, holding that there was no international consensus on the issue.

Yet, for all the political turmoil the original 2009 decision

² See Nathan Greenlaugh, *When a Cross Isn't a Cross*, BALTIC REPORTS (Jan. 13, 2010), <http://balticreports.com/?p=7933> (reporting the response of other Catholic states); see also *Lautsi v Italy – A Lost Opportunity*, EUROPEAN HUMANIST FED'N, http://www.humanistfederation.eu/index.php?option=com_content&view=article&id=277 (last visited Mar. 26, 2011) (reporting protests of the decision and the intervention of several European governments in the appeal).

³ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 57.

⁴ See John Hooper, *Human Rights Ruling against Classroom Crucifixes Angers Italy*, GUARDIAN (Nov. 3, 2009), <http://www.guardian.co.uk/world/2009/nov/03/italy-classroom-crucifixes-human-rights>.

⁵ *Id.*

⁶ *Freedom of Thought, Conscience and Religion: Lautsi v. Italy*, THE EUROPEAN PARLIAMENT PLATFORM FOR SECULARISM IN POLITICS, <http://politicsreligion.eu/news/lautsi-v-italy/> (last visited Mar. 26, 2011).

⁷ Press Release, European Court of Human Rights, *Crucifix: The Case of Lautsi v Italy Will Be Examined By The Court's Grand Chamber* (Mar. 2, 2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863761&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁸ *Lautsi v. Italy*, App. No. 30814/06, EUR. CT. H.R. ¶ 71-77 (Grand Chamber, Mar. 18, 2011), <http://www.echr.coe.int/echr/en/hudoc>.

ignited, it was a product of well-formed precedent; its reasoning drew not one dissenting opinion from the court.⁹ First, relying on a strong line of cases condemning non-objective, pluralistic religious teaching, the ECHR found that the display of the crucifix is a decidedly lopsided promotion of Christianity in schools.¹⁰ In so doing, the decision directly rejected the Italian government's proposition that the crucifix is less a religious symbol and more a symbol of Italian heritage, something that, by hanging in every public classroom, necessarily unifies its young citizens in one common spirit.¹¹ The decision built on precedent, defining religious teaching by finding that even religious symbols are considered part of a state's attempt to inculcate religious values.¹² Finally, the decision affirmed its support for a unified secular state by disapproving of any message that would alienate or create hardship for those choosing not to believe in religion.¹³

Each step of the original decision rested firmly in the words of the European Convention on Human Rights and previous decisions of the Court, but together they manifested a tipping point for citizens opposed to the rising secular voice of the ECHR.¹⁴ Ultimately the religious traditionalists won the political battle, as the Grand Chamber cited the 'margin of appreciation doctrine' to find that this decision was beyond the reach of the court.¹⁵ While the margin of appreciation doctrine does exist in controlling precedent, its use by the Grand Chamber signals a willingness to diminish the court's own power. Ultimately, the battle in *Lautsi* was not a legal battle: the judicial findings of the original decision were sound, as this note will show. However, *Lautsi* became a political battle, one in which the principles of neutrality called for in the Convention lost to the political sovereignty of religious European states.

⁹ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 1.

¹⁰ See *id.* ¶ 56.

¹¹ See *id.* ¶ 51.

¹² See *id.* ¶ 52.

¹³ See *id.* ¶ 55 ("[n]egative freedom of religion is not restricted to the absence of religious services or religious education").

¹⁴ Ligia de Jesus, *The Cross Versus the Court*, WASH. TIMES (Dec. 23, 2010), <http://www.washingtontimes.com/news/2010/dec/23/the-cross-v-the-court/> (depicting the proliferation of amicus curiae positions before the ECHR Grand Chamber appeal).

¹⁵ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 69 (Grand Chamber).

Part II of this note examines the ECHR's decision by providing an overview of the facts that would be useful in understanding the case. Part III includes the relevant legal background for understanding the Italian state's stance and the precedent on which the court in *Lautsi* relied. Part IV analyzes the court's original 2009 decision with reference to the legal traditions discussed in Part III. Part V briefly provides a useful comparison to the U.S. Supreme Court's struggle with religious freedoms in the public education setting, providing some perspective for the political struggle that informs the Grand Chamber's reversal, which is discussed in Part VI.

II. Overview of the Facts and Procedure of the Case

At the case's initiation, the plaintiff, Soile Lautsi, a Finnish mother, lived in Italy with her eleven and thirteen year old sons.¹⁶ The boys attended the Istituto Vittorino da Feltre, a public school in Abano Terme.¹⁷ Ms. Lautsi found the school's display of crucifixes in each classroom detrimental to the religiously-neutral principles which she wished to instill in her children.¹⁸ She voiced her concern at a meeting held by the school, emphasizing that the Italian courts had recently ruled the presence of a crucifix in election stations was contrary to the State's proclaimed secularism.¹⁹

The school's administrators, however, found her request less compelling than the virtues they believed the symbol instilled in their pupils, and took no action to change the display of the crucifix in classrooms.²⁰ Ms. Lautsi then brought suit in the Administrative Court, asserting that the school's position violated the secular declarations of Articles 3 and 19 of the Italian Constitution and Article 9 of the European Convention on Human Rights.²¹ The case was transferred to Italy's Constitutional Court, a separate jurisdiction from the Administrative Court, to address

¹⁶ *Id.* ¶ 6.

¹⁷ *Id.*

¹⁸ *See id.* ¶ 7 (characterizing Lautsi's preference for neutrality as a preference for secularism).

¹⁹ *See id.* ¶ 7 (citing Cass., sez. IV, 1 marzo 2000, n. 4273, DE 2000, II, 217 (It.)).

²⁰ *See de Jesus, supra* note 14, ¶ 8.

²¹ *Id.* ¶ 9.

the constitutional violations alleged by the plaintiff.²² On the constitutional issue, the government defended its actions by maintaining that the presence of crucifixes in classrooms is “natural,” as the crucifix is not just a religious symbol, but the “banner of the Catholic Church,” the only church mentioned in the Italian Constitution.²³ Such stature makes the crucifix a symbol of Italian patriotism.²⁴

In an interesting and now infamous procedural wrinkle, the Italian Constitutional Court refused to resolve the constitutional conflict. In December 2004, the Court held that it did not have jurisdiction because the issue was an administrative law question rather than a constitutional one: the plaintiff’s primary complaint concerned regulations compelling the school to display the cross.²⁵

The case was remanded to the Administrative Court, which dismissed the application in March 2005.²⁶ It held that the crucifix was a symbol of “Italian history and culture and therefore of Italian identity.”²⁷ It also found that the crucifix represented “principles of equality, freedom, and tolerance” that underlie “the State’s secular basis.”²⁸ The plaintiff’s appeal was dismissed at the highest level of state administrative jurisdiction but never returned to the Constitutional Court.²⁹ In the procedural handling of the case, the Italian courts never addressed the conflict between the Italian Constitution, with its explicit secular ideals, and a national identity, with a strong religious heritage that would be difficult to surrender without feeling that Italian sovereignty is threatened.

Such an unresolved conflict was not lost on Ms. Lautsi and her attorneys. The plaintiff continued to seek redress for her claim in the ECHR.³⁰ She maintained that the school’s action violated

²² *Id.* ¶ 11.

²³ *Id.*

²⁴ *See id.*

²⁵ *Id.* ¶ 12.

²⁶ *See de Jesus, supra* note 14, ¶ 13.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* ¶ 15 (noting Lautsi’s appeal to the *Consiglio di Stato* without any subsequent procedure).

³⁰ *Id.* ¶ 1.

Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms.³¹ Her case was accepted in the European court based on the factual development.³² Even as the higher court accepted this complaint, the Italian state attempted to bolster its own courts' decisions: The Italian Ministry of Education adopted additional directives recommending that school principals display crucifixes to cultivate virtue, citing historic decrees made before the modern Italian state was formed.³³ The Ministry then joined the case, arguing that these royal decrees pre-dating the constitution mandated crucifixes in every classroom and that the schools were merely following what had long been a national position.³⁴

III. Legal Background

A. Italian Domestic Law and the Role of Religion in the Italian State

The justification for the argument that crucifixes are in classrooms more for "Italian" reasons than "religious" reasons rests on the fact that mandates to place them in classrooms predates the creation of the Italian state. A decree dating back to 1860 required that "each school without fail be equipped . . . with a crucifix."³⁵ When Italy was formed as a nation state, the Roman Catholic Church was officially bound to its national identity.³⁶

When modern fascist views began gaining political strength in the 1900s, the Italian government issued a series of decrees continuing the obligation to display crucifixes in classrooms in hopes of bolstering a sense of Italian nationalism among its citizens.³⁷ Deploring the removal of religious portraits from the public school classrooms, the Italian government demanded these

³¹ *Id.* ¶ 27.

³² *See id.*

³³ *See id.* ¶ 10.

³⁴ *See id.* (citing R.D. 30 aprile 1924 n. 965, art. 118 (It.) and R.D. 26 aprile 1928 n. 1297, art. 119 (It.)).

³⁵ *Id.* ¶ 16 (quoting R.D. Reg. Piemonte-Sardegna 15 settembre 1860 n. 4336, art. 140 (It.)).

³⁶ *Id.* ¶ 17.

³⁷ *Id.* ¶ 19.

portraits be returned because they were essential to the education the state intended to provide.³⁸ In the 1920s, the Italian Ministry of Education circulated two decrees that mandated crucifixes be placed in every public school classroom to help cultivate the virtue and character that public schools sought to afford the nation's youth.³⁹ The Italian National Court's ruling in *Lautsi* held that those decrees are still in force today and apply in the present case. For procedural reasons, however, the Court did not directly address this conflict with the secular Constitution.⁴⁰

The argument for the national importance of these crucifixes and the real disagreement between Italy and the ECHR runs deeper than the mandate of the two decrees. Since its inception, the Italian State has been intertwined with the Catholic Church, and during the 1920s, the Lateran Pacts legally solidified this relationship.⁴¹ Catholicism was confirmed as Italy's official religion.⁴² Non-Catholic religions were allowed to organize but only as long as they did not subvert the aims of the State (and by reason of association, the Catholic Church).⁴³

Not until 1985 was the Lateran Treaty amended to dissolve the status of the Catholic Church as the only religion of the Italian State.⁴⁴ Modern reforms have secularized the constitution to some degree, and the Italian Constitutional Court's more recent interpretations confirm the move towards secularization.⁴⁵ Textually, the Italian Constitution has replaced Catholic values with equality among all citizens.⁴⁶ It has also replaced the primacy of the Catholic Church with an equal stance toward all religions under the law.⁴⁷ The Constitutional Court has explicitly found that the actual curriculum and teaching in public schools should be

³⁸ See de Jesus, *supra* note 14, ¶ 19.

³⁹ *Id.* ¶¶ 19-20.

⁴⁰ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R.

⁴¹ *Id.* ¶ 21.

⁴² *Id.*

⁴³ *Id.* ¶ 22.

⁴⁴ *Id.* ¶ 23.

⁴⁵ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶¶ 24-25.

⁴⁶ Art. 3 Costituzione (It.).

⁴⁷ *Id.* at Art. 8.

secular rather than based on the views of Catholicism.⁴⁸

However, because the Italian Constitutional Court refused to address the issues in *Lautsi*, it avoided the conflict between its own precedent and the State's stance. Rather than deciding the constitutionality of these mandates, the Constitutional Court directed the Administrative Court to decide the administrative law issues. The equivocation of the Constitutional Court belies reluctance among Italians to embrace equality and freedom of religion at the risk of leaving behind the vestiges of traditions that have for so long united the Italian people.

B. Religion and Education Under the European Court of Human Rights

The Italian Constitution's transition to secularism is part of a longer journey that began after World War II. Growing out of a European desire to enter a new era of peace founded on equality and mutual respect for cultural difference, Italy became a signatory to the European Human Rights Convention.⁴⁹ Like all states bound to that convention, Italy is subject to judgment by the ECHR, which decided the *Lautsi* case for violations of treaty provisions.⁵⁰ Over the last several decades, the ECHR has developed a line of cases concerning educational and religious freedom based in Article Two of the First Protocol and Article 9 of the Convention, which read respectively:

[Protocol One, Article 2]

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

⁴⁸ *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 47.

⁴⁹ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Signature Table (Mar. 24, 2011, 9:15 AM), <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>. For a more comprehensive guide to the convention, see also, CLARE OVEY & ROBIN WHITE: *The European Convention on Human Rights* (4th ed. Oxford University Press 2006).

⁵⁰ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R.

conformity with their own religious and philosophical convictions.⁵¹

[Section One, Article 9]

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.⁵²

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.⁵³

Article 2 requires that a state's public education advance interests necessary for pluralistic, open democracies.⁵⁴ Reading both sentences of Article 9 as one idea, the court has found that the protection of individual convictions can only be compromised by a state interest in protecting the rights and interests of others.⁵⁵ In education cases, the tenets of each article complement each other, serving to preserve the right to education for every child while at the same time assuring that that right should not encroach upon or be destroyed by equally legitimate interests in protecting an individual's religious beliefs.⁵⁶ The ECHR has also defined the specific rights preserved by Article 2 and 9 through statutory

⁵¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 1, art. 2, Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 221 [hereinafter European Human Rights Convention].

⁵² *Id.* § 1, art. 9.

⁵³ *Id.*

⁵⁴ *Kjeldsen v. Denmark*, App. Nos. 5095/71, 5920/72, 5926/72, 1 EUR. H.R. REP. 737, ¶ 53 (1976).

⁵⁵ *Id.* ¶ 52.

⁵⁶ *Id.*

interpretation.⁵⁷ Analyzing both, the court has found that the term “belief,” found in Article 9, and “conviction” in Article 2 are virtually synonymous, referring to principles which are serious, deeply held, and well-articulated.⁵⁸

While the ideals of the ECHR are fairly clear in their language, the articles are broad, and their application is often at odds with the traditions of the various nations that have signed the convention.⁵⁹ Weighing a variety of cultures and states with various dispositions towards religion, the court has always returned to the principle that states must respect an individual’s convictions.⁶⁰ However, it has tried to defer to each nation’s interest in preserving its religious traditions when deciding what it means for the state to respect an individual’s religion.⁶¹ More recently, in the realm of religious freedom and education, the court has moved away from deferring to state decisions about what is democratically necessary and towards finding a secular solution.⁶²

⁵⁷ See, e.g., *Campbell v. United Kingdom*, App. 7511/76, 48 EUR. CT. H.R. 1, ¶16 (1982).

⁵⁸ *Id.* ¶ 36.

⁵⁹ See Memorandum from Grégor Puppink, Dir., European Ctr. for Law and Justice, ECHR - Lautsi v. Italy § I (Apr. 2010), <http://www.eclj.org/pdf/ECLJ-MEMO-LAUTSI-ITALY-ECHR-PUPPINCK.pdf> (describing the ‘margin of appreciation’ doctrine which allows the various countries of Europe some degree of variability in adhering to the rules of the Convention while respecting state traditions).

⁶⁰ See, e.g., *Valsamis v. Greece*, App. No. 21787/93, 1996-VI EUR. CT. H.R. 2313, 2324, (stating that the “[Convention] forbids the State ‘to pursue an aim of indoctrination that might be regarded as not respecting parents’ religious and philosophical convictions”).

⁶¹ See *Angeleni v. Sweden*, App. No. 10491/83, 51 Eur. Comm’n H.R. Dec. & Rep. 41 (1986). (The court refused to grant an exception to the daughter of an atheist mother because the government-mandated course on religious knowledge had a legitimate aim in providing all children with some education in the subject). See also *Sahin v. Turkey*, App. No. 44774/98, (EUR. CT. H.R. June 29, 2004) ¶ 100 (preliminary objection) (“As is well established by [the Court’s] case-law, the national authorities are in principle better placed than an international court to evaluate local needs and conditions”).

⁶² See *Buscarini v. San Marino*, App. No. 24645/94, 1999-I EUR. CT. H.R. 605 (denying the state’s long standing tradition of swearing in public leaders with oath to the Holy Gospels). Also compare *Kjeldsen*, App. No. 5095/71, 23 EUR. CT. H.R. (ser. A) (balancing the rights of parents to ensure that a sex education course conforms with their Christian convictions) with *Folgerø v. Norway*, App. No. 15472/02, 46 EUR. H.R. REP. 1147 (2007) (addressing the rights of parents to exempt their children from a mandatory primary school course on Christianity, religion, and philosophy).

When looking at Article 2 claims, the court has consistently held that any attempt by the state to indoctrinate students in a particular religion violates Article 2.⁶³ However, in deference to the cultural traditions of individual states, the court has found that if a proper balance between majority and minority religions can be reached, the ideals of pluralism can still be embraced even where one religion figures more prominently in the curriculum.⁶⁴

A number of parents have turned to the ECHR to exempt their students from classes they find contradictory to their religious beliefs.⁶⁵ The court has examined the facts of each case by balancing the government's interests against parental rights subject to Article 2.⁶⁶ Deference to state decisions about education marked the court's decisions for several years, and the court found that parents whose convictions conflicted with state educational decisions could pursue private alternatives.⁶⁷ However, more recently, the court has been less accepting of state educational decisions that exclude children based on their convictions, finding that states fail to meet their obligation to educate all children under Article 2 if some students are forced away by religious convictions.⁶⁸

C. *Religious Symbols in the Educational Setting*

While a wealth of case law exists concerning violations of Articles 2 and 9 based on school curriculum or mandatory activities, little exists concerning religious symbols in the school

⁶³ *Kjeldsen*, 23 EUR. CT. H.R. (ser. A) at 26, ¶ 53.

⁶⁴ *Id.*; *Folgerø*, 46 EUR. H.R. REP. at 1162, ¶ 38.

⁶⁵ *See, e.g., Kjeldsen*, 23 EUR. CT. H.R. (ser. A).

⁶⁶ *See, e.g., id.* (weighing the State's interest in providing sex education, which served the purpose of supplying students with useful information intended to curtail the excessive birth rate out of wedlock, against the fact that the course offended Christian parents' religious and philosophical convictions).

⁶⁷ *See Valsamis*, 1996-VI EUR. CT. H.R. (denying an exemption from a school-wide parade celebrating the State's military victory, which offended parents' pacifist religion, on the basis that the child's obligation to attend the parade did not deprive her parents of supplying the child with their own guidance and religious/philosophical knowledge); *see also Kjeldsen*, 23 EUR. CT. H.R. (ser. A) at 27-28, ¶ 54 (denying an exemption from a sex education course because parents could enroll their children in the State's heavily subsidized private schools, which were not bound by the strict obligations of the public school).

⁶⁸ *Folgerø*, 46 EUR. H.R. REP. at 1193, ¶ 101.

setting.⁶⁹ *Sahin v. Turkey* provides the only defining precedent on the Court's view of religious symbols in the educational setting, though it involves almost opposite facts to the present case.⁷⁰ In *Sahin*, the Court examines a Turkish university's ban on religious headgear.⁷¹ Sahin, a member of the faculty of the medical school, brought a suit under Article 9, claiming that her religious freedoms were violated.⁷² The story of *Lautsi* is thus inverted, because the State promoted a secular interest, and the individual expressed a religious interest.

The ECHR's analysis began by observing that no agreement existed between the various European governments on how to address religious symbols or clothing in public schools.⁷³ Relying on applications of Article 2 and Article 9, it modified the balancing test between the necessity of the state's action to support the interest of its democracy, and the gravity of the infringement on the individual.⁷⁴ The court looked closely at the secular interest expressed by the Turkish government in support of the ban.⁷⁵

Once the court determined the interest to be secular, and thus aligned with Article 9 freedoms, the ECHR looked at whether the ban on religious headgear was appropriately tailored to meet the state's interest while infringing as little as possible on the individual's rights.⁷⁶ The court upheld the ban for several reasons. First it observed that the broad ban on headscarves and beards that had originally inspired the suit had been re-written to include all overt symbols of religion, especially religious clothing.⁷⁷ The court also found that the ban had been formed after many years of discussion and debate, both in the administration and the Turkish courts.⁷⁸ Lastly, the court observed that the modest and flexible

⁶⁹ See discussion *infra* Part III.B.

⁷⁰ *Sahin v. Turkey*, App. No. 44774/98, 2005-XI EUR. CT. H.R. 173.

⁷¹ *Id.* ¶ 16.

⁷² *Id.* ¶ 18.

⁷³ *Id.* ¶ 55-65.

⁷⁴ See *id.* ¶ 110.

⁷⁵ See *Sahin*, 2005-XI EUR. CT. H.R. at 206-207, ¶ 116.

⁷⁶ See *id.* ¶ 117.

⁷⁷ *Id.* ¶ 47.

⁷⁸ *Id.* ¶ 120.

sanctions manifested a will to deal reasonably with the situation.⁷⁹ The ECHR thus relied on the decision making process, the interest of the state, and the reasonableness of the measures taken in concluding that the ban did not violate Article 9.⁸⁰ However, the facts presented by *Lautsi* make for a much more difficult case because the state's interest, while rich in national tradition, is not secular, creating a seeming paradox of the argument so easily solved in *Sahin*.

IV. Analysis

A. Objective, Pluralistic Teaching

Following the precedent of cases concerning the juxtaposition of public education and personal convictions, the ECHR's first step in *Lautsi* was to stress the importance of objective, pluralistic teaching in maintaining a democratic society.⁸¹ Objective teaching, especially in the context of religious education, assures that no particular group is persecuted or maligned.⁸² The court took a stronger stance than it had in earlier cases, however, finding that necessity of the state to provide objective teaching becomes even stronger in a majority-religion state like Italy, where minority views are likely to be easily suppressed.⁸³

The care with which the state must maintain neutrality and objectivity in teaching is also heightened by the sensitivity of a young child's mind.⁸⁴ As the court observed:

The schooling of children is a particularly sensitive area in which the compelling power of the State is imposed on minds which still lack (depending on the child's level of maturity) the critical capacity which would enable them to keep their distance from the message derived from a

⁷⁹ *Id.*

⁸⁰ See *Sahin*, 2005-XI EUR. CT. H.R. at 208, ¶ 122.

⁸¹ *Lautsi v. Italy*, App. No. 30814/06, EUR. CT. H.R. ¶ 50 (Nov. 3, 2009), <http://www.echr.coe.int/echr/en/hudoc>.

⁸² *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 48. See *supra* text accompanying note 58.

⁸³ *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 50. Compare *Folgero*, *supra* note 62 (finding that even though Christianity was given primacy in the curriculum, the teaching was still objective as it introduced other religions.)

⁸⁴ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 48.

preference manifested by the State in religious matters.⁸⁵

Relying more on reasoning than precedent, the court concluded that the children's age in *Lautsi* made their exposure to religious symbol more likely to impress upon them the importance of one religion.⁸⁶

B. Rejection of the Predominantly Secular Meaning of the Crucifix

The court was especially blunt in its rejection of the Italian government's stance on the civic value of the crucifix.⁸⁷ Finding that the Catholic Church holds the symbol of the crucifix to have a deep, fundamental meaning, the court refuted the proposition that this meaning would not be pressed upon the young minds in the classroom.⁸⁸ While the court did not explicitly deny that the crucifix holds secular meaning as well, it refused to recognize Italy's use of the crucifix to cultivate nationalism.⁸⁹

It is readily apparent why the court found that the crucifix would be interpreted by students in classrooms as a religious symbol.⁹⁰ However, the rejection of the democratic necessity of the state to display it as a symbol of its heritage and nationalism is a stronger stance by the court against the individual decisions of the sovereign states over which it presides.⁹¹ It is precisely this stance that has so inflamed political leaders, who decry the move away from providing some "margin of appreciation" of each country's traditions.⁹² However, the court's stance is demanded by the particular facts and circumstances of the case. The reasoning was that the national interest of Italy is much more explicitly tied

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 54.

⁸⁷ *Id.* ¶ 51.

⁸⁸ *Id.* ¶ 53.

⁸⁹ *Id.* ¶ 56.

⁹⁰ The argument that the crucifix is not to be interpreted as a religious symbol is facially barren; see, e.g., ENCYCLOPEDIA BRITANNICA, *Cross (Religious Symbol)*, (Encyclopedia Britannica, 2003). ("The cross is thus a sign both of Christ himself and of the faith of Christians").

⁹¹ Compare Puppink, *supra* note 59 and accompanying text.

⁹² See Puppink, *supra* note 59, at 2 (finding the Court in error for demanding a secular stance of a traditionally religious state, the author seeks to promote a pluralism that would allow one religion primacy as long as others are tolerated).

to a single religious ideology than the national interests the court has examined in previous cases concerning governmental interest and the individual's rejection of state-mandated activities.⁹³

Since its inception, the court has had to balance the ideals of equality, egalitarianism and the national traditions of each country.⁹⁴ As Europe has moved to a more centralized state, the power of the court has grown, and the Court has deferred less to the independent member interests of each of its states, resolving its decisions based on the principles of the convention without regard to traditional values of each state.⁹⁵ While the court's previous decisions have found compromise in exemption for particular students or by finding that state's interests were not explicitly religious, the particular facts of *Lautsi* forced the court to decide whether a tradition that is undoubtedly religious should be allowed if the state finds it necessary for the propagation of its particular democracy.⁹⁶

The decision the court faced was whether the protection of pluralism and religious objectivity in Articles 2 and 9 could be upheld when one religion was given primacy, even if it was not explicitly taught for the purpose of indoctrination. While the court has been firm in its rejection of indoctrination, it has taken a shifting view of the "necessity" of quasi-religious states to inculcate virtues in their classrooms through religious messages, moving towards a more unified rule of secularism.⁹⁷ While the *Lautsi* ruling was hardly a leap from precedent, it expressly confirmed the secular principles of the European Convention on Human Rights over the moral principles of Christianity upon which many European states are built.⁹⁸

The Italian government's argument appeared nuanced at first:

⁹³ Compare Puppink, *supra* note 59 and accompanying text.

⁹⁴ See Jim Murdoch, *Freedom of Thought, Conscience and Religion*, 9 HUMAN RIGHTS HANDBOOKS 50 (Council of Europe 2007); see also OVEY & WHITE, *supra* note 49.

⁹⁵ See *Folgerø v. Norway*, App. No. 15472/02, 46 EUR. H.R. REP. 1147, ¶ 99-101 (2009) (finding against Norway's will to give primacy to Christianity in a pluralistic curriculum, despite the acknowledgment that Norway is a Christian religious state).

⁹⁶ See *id.*

⁹⁷ See Puppink, *supra* note 59.

⁹⁸ See *Lautsi v. Italy*, App. No. 30814/06, EUR. CT. H.R. ¶ 51 (Nov. 3, 2009).

the State is justified in promoting the cross because the cross predates the constitution.⁹⁹ However, the real importance of the argument, and the court's rejection of it as adequate justification for the State's action, are central to understanding the tension that has developed over the *Lautsi* decision.¹⁰⁰ The Italian State's argument—if taken as more than sophisticated rationalization—is that the modern Italian State is built on a constitution that grew out of fundamentally Christian doctrines and decrees.¹⁰¹ Therefore, the State is merely instilling a respect for the philosophical heritage on which it was built by promoting the symbol of Christianity in its classrooms. So, rejecting the democratic necessity of this act is like rejecting the democratic necessity of instilling a respect for the Italian national heritage. This line of thinking is precisely what has drawn such support from other religious European states and legal scholars.¹⁰²

C. *Passive Religious Indoctrination*

Equally troubling for many Europeans was the court's holding that the mere presence of a religious symbol in a state-run classroom is enough to be considered “persecuting” or “disrespectful” of minority views.¹⁰³ In this respect, the court must now extend its scant precedent on religiously symbolic clothing or articles in the classroom.¹⁰⁴ However, where the court in *Sahin v. Turkey* affirmed the state's secular interest and rejected the individual's interest in wearing religious clothing, in *Lautsi v. Italy* the court must use the same reasoning as to the effect of religious symbols in the classroom to reject the state's interest.¹⁰⁵ The rejection of the state's interest is significant, as it condemns many of the Christian states' traditions that are far from indoctrination or requirements of allegiance to the state religion.¹⁰⁶

⁹⁹ See discussion *infra* Part III.A.

¹⁰⁰ See generally Puppink, *supra* note 59; see also de Jesus, *supra* note 14.

¹⁰¹ See *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 37.

¹⁰² See generally Puppink, *supra* note 59.

¹⁰³ See Greenlaugh, *supra* note 2 (noting Lithuania's prominent use of the Cross as a state symbol).

¹⁰⁴ See discussion *infra* Part III.C.

¹⁰⁵ *Sahin v. Turkey*, App. No. 44774/98, 2005-XI EUR. CT. H.R. 173.

¹⁰⁶ See Greenlaugh, *supra* note 2 (noting the problems posed by the decision to

The court also found that the fundamental meaning of the crucifix would not be lost on the young minds that observe it, so that it really was a tool of the state used in the classroom to make impressions on the minds of the children forced to observe it.¹⁰⁷ The various state governments of Europe have different histories of religious traditions, many of which persist in everyday practice.¹⁰⁸ In fact, it is unclear whether the original purpose of the new rights defined by the European Convention on Human Rights were contrary to the then-existing historical and traditional religious values of the European nations.¹⁰⁹ But with this decision, the new and old values have become more squarely opposed, as even the vestiges of the once overtly religious government must be wiped away so that the state is not violating the personal convictions of citizens who are not members of the state religion.¹¹⁰

The court was careful to limit its decision to the educational setting as a matter of rule.¹¹¹ It held that the use of symbols in the classroom, even if present for historical reasons, extended beyond the use of religious symbols in other parts of government, which it had allowed in previous decisions.¹¹² However, its comments on the subject were brief enough to leave the question open: what traditions of state government will the court find to be an affirmation of a particular religion by the state.¹¹³ More importantly, such an affirmation is specifically contrary to the ideals of the convention under Article 9. Though the court limited its discussion to the educational setting, its comments left an

Baltic state governments); *see also* de Jesus, *supra*, note 14 (opposing the secular demands of the decision).

¹⁰⁷ *Lautsi v. Italy*, App. No. 30814/06, EUR. CT. H.R. ¶ 54 (Nov. 3, 2009).

¹⁰⁸ *See* Hooper, *supra* note 4 (citing the longstanding Italian state entwinement with religion); Greenlaugh, *supra* note 2 (observing the threat to Lithuanian heritage posed by removing state sponsored crosses); *see also* Puppink, *supra* note 59 (calling for a more permissive plurality that allows religious symbols to be used by states with religious traditions).

¹⁰⁹ Murdoch, *supra* note 94, at 9.

¹¹⁰ *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 52-53.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.* (citing dicta that historical gestures previously approved by the court were nonetheless still viewed by the court as religious in nature).

ambiguous stance towards governmental activity that is latently religious in nature.¹¹⁴

D. Negative Freedom of Religion

The final component of the court's analysis was its holding that a negative freedom of religion, the right not to be confronted with religion in public life, is protected by Article 9.¹¹⁵ The court voiced special concern for situations in which the state, in affirming a particular religion, placed those with a preference for no religion in the difficult position of having to make great sacrifices to avoid religious messages.¹¹⁶ In the educational setting, since education is guaranteed by states adhering to the convention, precedent has been that virtually any clear favoritism for one religion in the classroom forces minority parties to go to great lengths to avoid the religious message.¹¹⁷ *Lautsi* went further, concluding that not only religious teaching, but also religious symbols sponsored by the state, violate the human rights of individuals who wish to believe in no religion.¹¹⁸

While voicing such overt approval of a negative freedom of religion is clearly in line with the secular ideals of the convention, the rising secular voice of the court is increasingly controversial.¹¹⁹ Not only individuals, but entire states find it problematic that the ideals of the convention are being interpreted as favoring secularism over religion.¹²⁰ The logic is that the objective, pluralistic aim of society necessarily requires state neutrality on religion.¹²¹ It is the second step that is difficult for many to grapple with: what is state neutrality? If it is a preference for no religious message or tradition over any religious one, the

¹¹⁴ *Id.*

¹¹⁵ *Id.* ¶ 55.

¹¹⁶ *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 55.

¹¹⁷ See *Folgerø v. Norway*, App. No. 15472/02, 46 Eur. H.R. Rep. 1147, 1190-93 (2007) (concluding that really any alternative provided by the state for those individuals that wish to excuse themselves from non-objective religious teaching is ultimately too burdensome to survive review).

¹¹⁸ *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 55.

¹¹⁹ See de Jesus, *supra* note 14.

¹²⁰ See generally Puppink, *supra* note 59.

¹²¹ *Lautsi*, App. No. 30814/06, EUR. CT. H.R. ¶ 47.

convention demands that all states be secular.¹²² However, if secularism is respected as a belief of equal legitimacy to that of any particular religious belief, always giving it primacy in the courts is exactly contrary to the objective, pluralistic goals of society. While the other aspects of the *Lautsi* decision are nuanced rulings re-defining particular aspects of Article 9 violations, it is this central question, “should secularism be given preference,” which disturbs so many individuals and European states.¹²³

V. Analogous First Amendment Law in the United States

Although the comparison is too complex to make fully here, it is worth briefly looking at how the United States Supreme Court has dealt with the issue of religion and education. Unlike most European states, the U.S. has, since ratifying its Constitution, required a separation of church and state, a concept of such fundamental importance that it has become a common piece of civic knowledge.¹²⁴ Nonetheless, the Court has struggled with what that means in the educational setting, especially with regard to the question of whether individual states or communities should be allowed to give primacy to Christian traditions over pure secularism.¹²⁵ Though nearly all recent cases regarding religious messages in schools have been decided in favor of a pluralistic, secular stance, many have brought bitter dissents that voice the Christian traditions implicit in the founding of the U.S. government, an argument very akin to that made by the Italian government in *Lautsi*.¹²⁶ The outrage of dissenters, parallel to that

¹²² *Id.* ¶ 16.

¹²³ See *Lautsi v Italy - A Lost Opportunity*, *supra* note 2, ¶ 10-14 (describing the reaction of members of the European parliament, who argue that secular states and religious states should be treated differently under the convention).

¹²⁴ U.S. CONST. amend. I.

¹²⁵ See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (finding in a 6-3 decision that student-led school prayer at high school football games in rural Texas is a violation of the First Amendment.).

¹²⁶ See *id.* at 318 (Reinquist, J., dissenting) (stating “[n]either the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of ‘public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.’”) (citing Presidential Proclamation, 1 Messages and Papers of the Presidents,

of the religious states reacting to *Lautsi*, is that neutrality or absence of religion is the new standard in education rather than simply tolerance of minority religions or a prohibition against persecution.¹²⁷ That the U.S. government, which has never allowed its institutions to be religiously tied, still fights so bitterly over the issue of religious exposure in schools, sheds some light on the crisis that the *Lautsi* decision drew: that explicitly religious states are being stripped of any way to inculcate religious values among their citizens.

VI. The Grand Chamber Decision

The pivotal issue argued by the many European states and amici curiae joining Italy in front of the grand chamber was that the court was favoring secularism—in essence atheism—above any religion.¹²⁸ This, these many voices said, was in contravention of the call for neutrality of the convention: favoring secularism was not neutral.¹²⁹ The majority of the Grand Chamber agreed, though it did not rest its decision on that issue.¹³⁰

Rather, the court, examining the same facts and law, decided first that the placement of the cross in classrooms does not rise to the level of indoctrination—which would violate the convention.¹³¹ Secondly, that this kind of quasi-supportive action by the state of one religion came within a realm of action not reviewable by the ECHR under the margin of appreciation doctrine.¹³²

1789-1897, p. 64 (J. Richardson ed. 1897)); see also *Lee v. Weisman* 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (stating “[i]n holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so, lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”).

¹²⁷ See *Santa Fe Independent School Dist.* at 325, (Renquist, J., dissenting) (stating “our Establishment Clause jurisprudence simply does not mandate ‘content neutrality.’”).

¹²⁸ *Lautsi v. Italy*, App. No. 30814/06, EUR. CT. H.R. ¶ 33, 47 (Grand Chamber) (Mar. 18, 2011).

¹²⁹ *Id.*

¹³⁰ *Id.* ¶ 60.

¹³¹ *Id.* ¶ 71.

¹³² *Id.* ¶ 70.

In holding that the display of the crucifix is not indoctrination by the state, the court evinces a very deferential attitude towards state religious action and oppression. In its decision, the Grand Chamber not only held Italy's use of traditional religious symbols in classrooms, but also supported another state's banning of traditional muslim headwear by a teacher, under the same principal of neutrality.¹³³ That each state has such flexibility to construe the convention's call for neutrality as it wishes does not bode well for future oppression of minority religions. But this, apparently, is the stance towards human rights the court will embrace, its will to pursue equality snuffed out by religious fervor and political strength.

VII. Conclusion

Although the original decision in *Lautsi v. Italy* made no great departure from precedent, it marked a decidedly stronger stance of the ECHR against state religion. Relying on the necessity of pluralistic teaching in upholding equality of convictions under the law and the proselytizing effect of overtly religious symbols, the ECHR held that the placement of crucifixes in public classrooms violated Articles 2 and 9 of the European Convention of Human Rights. The reaction of Catholic governments in Europe manifested the rising tension among religious states as they are forced to let go of the traditions that they feel bind their people. The Grand Chamber's reversal acquiesced to those voices, but did so without clarifying the aims of Articles 2 and 9 of the convention. In its reversal, the court has signaled to member states that tacit religious indoctrination will be permitted, and the strength of the convention's call for equality has definite bounds.

The various state governments of Europe have different histories of religious tradition, many of which persist in every day practice.¹³⁴ In fact, it is not apparent that it was originally thought that the new rights defined by the convention were contrary to the

¹³³ *Id.* ¶ 72-74.

¹³⁴ See Hooper, *supra* note 4 (citing the longstanding Italian state entwinement with religion); Greenlaugh, *supra* note 2 (observing the threat to Lithuanian heritage posed by removing state sponsored crosses); see also Puppink, *supra* note 59 (calling for a more permissive plurality that allows religious symbols to be used by states with religious traditions).

values long-defined by the religious values of the European nations.¹³⁵ But with this decision, the new and old values became more squarely opposed. And when push came to shove, the court backed down from calling state favoritism of one religion above others a violation of human rights.

¹³⁵ Murdoch, *supra* note 94, at 52.