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Zoethout, C.M.

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Religious Symbols in the Public School Classroom: A New Way to Tackle a Knotty Problem

Carla M. Zoethout*

Associate Professor of Constitutional Law, University of Amsterdam, the Netherlands

Abstract

The two opposite decisions in *Lautsi* I and II demonstrate the necessity of developing a new doctrine for the ECtHR.

Keywords

Lautsi; religion; symbols; margin of appreciation; new doctrine

I. Introduction

In the beginning of the twenty-first century, after a period of relative absence in the last few decades, the position of religion and the relationship between church and state is again a matter of public debate in European societies. Religion seems to pervade the life of countless citizens and the diversity in religious convictions is only increasing.¹ Needless to say, the ‘return of religion’ has come with many problems. One only has to think of the vehement debate on religious slaughter and animal welfare in the Netherlands, the prohibitions of the *burqa* that have come into effect in several European countries and the increasing conflicts surrounding religious symbols and garments.² The recent decisions on the Italian

* Contact: c.m.zoethout@uva.nl.

¹ For the discussion on the relationship between state and religion, see: Paul Cliteur, *The Secular Outlook, in Defense of Moral and Political Secularism* (Wiley-Blackwell, 2010); Carla M. Zoethout, ‘“Let it Become the Political Religion of the Nation”, Liberal Democracy as Public Morality’, 96 *Archiv für Rechts- und Sozialphilosophie* (2010), pp. 485–497.

² See Malcolm D. Evans, ‘From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights’, 26 *Journal of Law and Religion* (2010–2011), pp. 345–470. Seyla Benhabib, ‘The Return of Political Theology: The Scarf in Comparative Constitutional Perspective in France, Germany and Turkey’, 36 *Philosophy and Social Criticism* (March/May 2010), pp. 451–471. Isabelle Rorive, ‘Religious Symbols in the Public Space; in Search of a European Answer’, 30 *Cardozo Law Review* (2008–2009), pp. 2669–2698. Relevant cases before the ECHR are: *Leyla Sahin v. Turkey*, 10 November 2005, European Court of Human Rights, No. 44774/98 (Grand Chamber); *Aktas v. France*, 17 July 2009, European Court of Human Rights, No. 43563/08. Combined admissibility decisions in applications brought by Muslim girl pupils: *Aktas v. France*, No. 43563/08; *Bayrak v. France*, No. 14308/08; *Gamaleddyn v France*, No. 18527/08; *Ghazal v.*

crucifixes by the European Court of Human Rights (in first instance by the Chamber and subsequently by the Grand Chamber)³ are but two in a series of decisions on these matters. But they are also to some extent special cases.⁴ Whereas the first decision underlines the necessity of state neutrality regarding public education, the second accepts a wide margin of appreciation for the state in this respect. What it really all boils down to in the *Lautsi* case is whether religious symbols at state schools should be permitted at all? If not, one may add, whose viewpoint should be decisive?

In this article, the answer to the first question will be negative and brief. Religious symbols should not be displayed at public schools. But I intend to go beyond this, in answer to the second question. That will be the main focus of this comment. I will argue that it is time for the Court to consider a new doctrine, which makes it possible to act as a counter-majoritarian institution and set a European standard, without infringing state sovereignty. This new doctrine will enable the Court to avoid becoming a court whose decisions are not respected by the Member States and nevertheless to act as a truly supranational court.

II. Religious Symbols and their Meaning

As a start to this paragraph, I intend to submit you to a short test. Consider the following. Suppose you enter the office of a colleague for the first time. It is an orderly room, with many books and some paintings, and—small surprise—a crucifix at the wall. Once you have noticed this, what will be your first reaction? Yes, you will probably conclude this colleague is a Catholic. Does it matter for her work? Not at all. You only notice it, but the person in front of you is unmistakably Catholic. What I intend to demonstrate by this test will be obvious: the crucifix is a Catholic symbol. The argument that it is also the expression of “the principles and values which formed the foundation of democracy and western

France, No. 29134/08, involving the wearing of the headscarf. *J. Singh v. France*, No. 25463/08 and *R. Singh v. France*, No. 27561/08, concerning the wearing of a ‘keski’, an under-turban worn by Sikhs. In all these cases, the ban on the wearing by pupils of religious symbols constituted a legitimate restriction of their freedom to manifest their religion. It was considered proportionate to the aim of protecting the rights and freedoms of others and public order. The complaints under Article 9 were therefore manifestly ill-founded. Nor was there a violation of Article 2 of Protocol No 1 (right to education) in the cases of *Aktas*, *Bayrak*, *Ghazal*, *Jasvir Singh* and *Ranjit Singh*.

³ *Lautsi v. Italy*, 3 November 2009, European Court of Human Rights, No. 30814/06 (which will hereafter be referred to as *Lautsi I*) and Grand Chamber, *Lautsi v. Italy*, 18 March 2011 (hereafter: *Lautsi II*).

⁴ Susanna Mancini, ‘Taking Secularism (not too) Seriously: the Italian “Crucifix Case”’, 1 *Religion & Human Rights*, 2006, pp. 179–195. Susanna Mancini, ‘The Crucifix Rage: Supranational Constitutionalism Bumps against the Counter-Majoritarian Difficulty’, 6 *European Constitutional Law Review* (2010), pp. 6–27.

civilization,” is an escapist way of reasoning.⁵ The crucifix is a religious symbol and should be judged accordingly.

The display of religious symbols at public schools (as prescribed by the state)⁶ touches upon the freedom of religion, the freedom of parents to educate their children in conformity with their own convictions, and it touches upon the position of the state regarding public education. Since public education is provided by the state and education is compulsory, it logically follows that the state cannot but adopt an attitude of neutrality and impartiality towards religion. If not, if the state would demonstrate a preference towards a certain religion, that would amount to indoctrination by the state.⁷ The denominational neutrality which is to be expected from the state, is not limited to school education but also extends to the school environment.⁸ As the Court put it in *Lautsi I*:

The Court does not see how display in classrooms of public schools of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism that is essential to the preservation of a ‘democratic society’ as conceived by the Convention.⁹

III. The Margin of Appreciation and the Position of the ECHR

The Grand Chamber was confronted with a knotty problem in *Lautsi*. Upholding the first decision might have resulted in a refusal by the Italian government to submit to the Court’s decision and thereby have undermined its position as a supranational court. But deciding that Italy was free to prescribe the display of the crucifix at public schools seemed difficult to harmonize with Article 2, Protocol I (the right of the parents to educate their children in conformity with their own religious and philosophical convictions)¹⁰ and would not be in accordance with precedents on this provision. That may explain why the Court sought

⁵ As the Italian government argued in *Lautsi I* and II, see Grand Chamber, para. 67.

⁶ The question whether or not a teacher should be able to wear religious garments, for instance an Islamic headscarf or an under-turban of the Sikhs, will not be considered here, even though the outcome of the present article will be telling for that case too. Very elaborate on this topic is: Jeroen Temperman, ‘State Neutrality in Public School Education: An Analysis of the Interplay between the Neutrality Principle, the Right to Adequate Education, Children’s Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers’, 32:4 *Human Rights Quarterly* (2010), pp. 865–897.

⁷ Unless perhaps all religions (and life stances) are represented at public schools by their symbols, a solution which seems impractical and impossible. Joseph Weiler suggests this option in: ‘Lautsi: Crucifix in the Classroom Redux’, editorial by J.H.H. Weiler, *European Journal of International Law* (2010), pp. 1–5.

⁸ See also the Dissenting Opinion appended to the Grand Chamber decision by Judge Malinverni joined by Judge Kalaydjieva, para 8.

⁹ *Lautsi I*, para. 56.

¹⁰ Article 2, First Protocol ECHR, provides: “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.”

recourse to the doctrine of the margin of appreciation in this case, which was far from obvious.

Despite the fact that the margin of appreciation is a well-known doctrine in the Court's case-law, it is being used in particular in those areas where the provision at hand demands the State to strike a balance between competing interests. Thus, in the Articles 8–11 ECHR (the right to family life, freedom of religion, freedom of expression and the freedom of association), one of the clauses in paragraph 2 is that limiting the freedom must be necessary in a democratic society. When a consensus among the Member States about the 'legitimate aim' of the limitation is lacking, the state in question can be left a 'margin of appreciation'. The underlying idea is that what is 'necessary' can vary from state to state. For that reason it may occasionally be up to the Member State itself to decide what the right policy is in the specific case. The Court in those cases only acts as a supervisor. As a matter of fact, the margin of appreciation may be regarded as a European mode of judicial restraint.

So far, so good. But the problem with the 'margin of appreciation' is that the frequent use of the doctrine entails an automatic acceptance of state behaviour, without further scrutiny.¹¹ Thus, the Court itself may gradually contribute to undermining its position as a counter-majoritarian institution.¹²

The question is, however, whether the ECHR was ever really supposed to act as such? Is not the use of the 'margin of appreciation' and thereby submitting to state sovereignty an inevitable part of the system as a whole? Let me try to elucidate this. During the preparations for the ECHR it was not at all clear whether European states would be willing to empower an international commission and a court to safeguard human rights. A number of countries were initially not prepared to accept the jurisdiction of a court at all.¹³ Over time, however, one by one, the nations of the Council of Europe have consented to the right to individual petition and the jurisdiction of the Court. The Court has now gained the status of a supranational institution, whose decisions are accepted as legitimate, probably thanks to the doctrine of the margin of appreciation.

The use of this doctrine demonstrates that a number of provisions of the Convention should not be considered as absolute standards but can vary from place

¹¹ According to one critical commentator, Eyal Benvenisti: "Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights. If applied liberally, this doctrine can undermine seriously the promise of international enforcement of human rights that overcomes national policies. Moreover, its use may compromise the credibility of the applying international organ." (Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 31 *International Law and Politics* (1999), pp. 843–854, at p. 844).

¹² Susanna Mancini puts it thus: "To impose new duties stemming from the Convention, it [the Court] has no other method than to rely on consensus, thus avoiding taking direct responsibility for its decisions. In widely applying the doctrine of margin of appreciation, the Court, undermines its role of the external guardian against the tyranny of the majority." Mancini, *supra* note 4, pp. 25–26.

¹³ See Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law* (Oxford: Clarendon Press, 1995), pp. 18–29.

to place, depending on the specific circumstances at hand.¹⁴ Besides that, the Convention itself is a demonstration of the fact that the provisions do not all have the same status.¹⁵ That is to say, in the non-derogation clause (Article 15), the right to life (Article 2), the prohibition of torture and inhuman and degrading treatment (Article 3), the prohibition of slavery (Article 4) and *noella poena* (Article 7) are explicitly mentioned as having a status of being non-derogatory, even in times of war and emergency. Put differently, it is clear that the Convention system itself starts from the premise that there are certain rights having a special position—such as those mentioned in the non-derogation clause. When it comes to those rights, the Convention is undoubtedly the European standard and it is up to the Court to uphold this standard.

But that position cannot be maintained when it comes to other rights and freedoms. The Court is then confronted with a different situation. Since the 1950s the Council of Europe has increased from a mere dozen to 47 Member States, ranging from Malta to the United Kingdom, to Norway, and to the Ukraine. Even if the Court was supposed to act as a counter-majoritarian institution, which is questionable, one may doubt whether this is still a viable perspective—given that it is an institution supervising 47 states which are so very different in economical, cultural and religious background. The Court, for that matter, cannot be compared to the Supreme Court of the US, or the German *Bundesverfassungsgericht*. Even though the American states are very diverse, they are American states nonetheless, subject not only to a unitary system of human rights in the (over two-hundred years old) Constitution, but to other constitutional provisions as well.

What I mean to say is this. When the core of the Convention is at stake (the Articles 2, 3, 4 and 7) the Court truly *is* (and from the beginning has been) a supranational court, which is supposed to develop and uphold one European standard and whose decisions are binding for all Member States. When the Court is asked to decide matters relating to other provisions in the Convention, unless there is a consensus among the Convention States, an attitude of judicial restraint may be inevitable.

¹⁴ See also Benvenuti, *supra* note 11.

¹⁵ Article 15 ECHR states that: “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

IV. Why it Is Necessary for the Court to Develop a New Doctrine

The consequences of the above reasoning will be clear. If there are some provisions which are considered to have a special status, to be more ‘universal’ than others, the implication is that for the rest of the Convention provisions, the Court might be in a different position. That holds true for instance for the First Protocol, Article 2.

Does that mean the Grand Chamber has rightly sought recourse to the margin of appreciation, in *Lautsi*? No, in my view it has not. The standard in this case seems too obvious—in *public* schools the state cannot be but neutral. No place for a margin of appreciation here—there was no need for the state to strike a balance between competing interests. However, I am aware of the dilemma the Court was facing (and is regularly facing). That brings me to suggest the Court to develop a new mode of judicial review—a mode of review which I earlier referred to as opening the possibility to remain faithful to the Convention provisions and at the same time respect the democratic institutions at state level.

In *Lautsi*, the counter-majoritarian problem seems to manifest itself quite clearly. But just as the Court in *Handyside*¹⁶ expressed the doctrine of the margin of appreciation for the first time, it can learn from those systems which accept a form of judicial review without necessarily submitting to its problematic effects. Most notable is the British system which makes it possible for judges to conclude to a ‘declaration of incompatibility’, thereby avoiding frustrating Parliament by judging a legal measure void, but nonetheless reviewing government action. Why not consider introducing a European ‘declaration of incompatibility’?

In my view, this may be a meaningful way for the ECHR to follow. A ‘declaration of incompatibility’ enables the Court on the one hand to uphold a European standard—in this case that religious symbols should not be permitted at public schools—and on the other hand to respect democratic decision-making at state-level (and leave the solution *in concreto* to the Italian government). In the end, the importance of the *Lautsi* cases lies not so much in the decisions themselves, but rather in the fact that *Lautsi* paves the way to a new doctrine. A ‘declaration of incompatibility’ with the Convention norms on the one hand, upholds the human rights provisions, while on the other hand respects majoritarianism at the national level.

¹⁶ In *Handyside v. United Kingdom*, 7 December 1976, European Court of Human Rights, no. 5493/72, the Court uttered a since often repeated sentence: ‘By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them’ (para. 48).