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### **Is the glass half empty or half full?**

### **Lautsi v Italy before the European Court of Human Rights \***

**SUMMARY: PART I: 1. Introduction – 2. National proceedings – 3. The case before the ECtHR – 4. The decision of the court – 5. The reaction to the decision – Part II: A BRIEF ANALYSIS OF THE JUDGMENT. - 6. The composition of the court – 7. The meaning of the crucifix – 8. The holding of the case: did the court reach the right decision? – 9. The concept of neutrality – 10. Conclusion.**

#### **PART I:**

##### **1. Introduction**

The cultural war is nowadays a global affair.<sup>1</sup> Coined by James Davison Hunter<sup>2</sup> in the early 90's to describe a "cultural conflict", the term defines a "(...) political and social hostility rooted in different system of

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<sup>1</sup> See **M. VENTURA**, *La Guerra globale dei simboli religiosi*, in *Corriere della sera*, 28/01/2010. For a very interesting journalistic account see **J. MICKLETHWAIT, A. WOOLDRIDGE**, *God is back: how the global revival of faiths is changing the world*, Penguin Press, London, 2009. The literature on the global faith revival is impressive. Among the others see **J. CASANOVA**, *Public religions in the modern world*, University of Chicago Press, Chicago, 1994 and **G. KEPEL**, *The revenge of God. The resurgence of Islam, Christianity and Judaism in the modern world*, Polity Press, Cambridge, 2004. A very interesting analysis on the role of religious groups in global dynamics is given by **O. ROY**, *The Holy ignorance. When religion and culture part ways*, forthcoming, (on file with the author).

<sup>2</sup> **J. D. HUNTER**, *Culture wars. The struggle to control the family, art, law and politics in America*, Basic Books, New York, 1992.



moral understanding”<sup>3</sup>. Framed in the American context<sup>4</sup>, the cultural war, as theorized by Hunter, is a focal point in order to understand the fundamental and established assumptions that define the cultural identity of a nation. Therefore, it is no surprise that in a matter of few months we have seen two different courts, both the United States Supreme Court<sup>5</sup> and the European Court of Human Rights,<sup>6</sup> deal with the presence of the cross or crucifix in public spaces<sup>7</sup>.

The legal questions raised were different but, in both cases, the role and the meaning of specific religious symbols, once assumed to represent all the citizens are under attack due to the growing religious pluralism that the United States and Europe are facing.

Litigation on religious symbols may be perceived as silly or rather useless, but it must be remembered that such symbols are a fundamental element of “status politics”. They are a way to show and declare who counts in a community, who is in and who is out. They are a way to subliminally declare what is “on” and what is “off” the walls<sup>8</sup>.

This is why the case of *Lautsi v Italy*<sup>9</sup> brings litigation over religious symbols in public schools at a crucial point for Europe and for the case-law of the European Convention of Fundamental Rights<sup>10</sup>.

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<sup>3</sup> Above, p. 32.

<sup>4</sup> Hunter published his book in 1991, but in the European context the term *Kulturkampf* was widely used to describe the conflicts between Bismarck’s government and the Catholic church on the role of religion in Prussia and in the new German Reich. See **C. CLARK, W. KAISER**, (ed.), *Culture wars: Secular-Catholic conflict in nineteenth-century Europe*, Cambridge University Press, Cambridge, 2003.

<sup>5</sup> Hereinafter U.S. Sup. Court.

<sup>6</sup> Hereinafter ECtHR.

<sup>7</sup> I’m referring to the case *Salazar v Buono* 07-472 currently pending before the U.S. Sup. Court (regarding a Mojave cross placed on a rock to honour war dead) and to the case *Lautsi v Italy* that is the object of analysis of this note.

<sup>8</sup> See **E. POSNER**, *Law and Social norms*, Harvard University Press, Cambridge, 2002. The Italian debate on religious symbols is very rich. Among the others for a general overview see **E. DIENI, A. FERRARI, V. PACILLO**, *I simboli religiosi fra diritto e culture*, Giuffrè, Milano, 2006; **M. PARISI** (ed.), *Simboli e comportamenti religiosi nella società globale*, ESI, Napoli, 2006. **E. DIENI, A. FERRARI, V. PACILLO**, *Symbolon/Diabolon. Simboli, religioni, diritti nell’Europa multiculturale*, Il Mulino, Bologna, 2005.

<sup>9</sup> *Lautsi v Italy*, ECtHR, 3 November 2009.

<sup>10</sup> Hereinafter ECHR. A general overview of Italian and European case law concerning religious symbols in public spaces is provided by **S. MANCINI**, *Il potere dei simboli, i simboli del potere*, Cedam, Padova, 2009. See also **I. RORIVE**, *Religious Symbols in the Public Space: in Search of European answer*, in *Cardozo Law Review*, 30 (6), 2009, pp. 2669-2698, and **S. MANCINI**, *The power of symbols and symbols as power: secularism and religion as guarantors of cultural convergence*, in *Cardozo Law Review*, 30 (6), 2009, pp. 2629-2668. For an analysis of the general principles on religion in schools see



It concerns the compulsory display of a crucifix in an Italian public school. In April 2002, Ms Lautsi asked the board of the school to remove the crucifix because her children would feel offended by the display of the crucifix in the classroom. The board refused her request and she therefore turned to the national courts to remedy the school stand.

In the first part of this note I will go through the facts, the decision and the reactions to the judgment of the ECtHR. Secondly, I will briefly describe the composition of the court and focus on analysing the judgment by focusing on the central issues of the meaning of the crucifix, the holding of the case and the concept of neutrality adopted by the court.

I reach the conclusion that the holding of the Court, according to which the compulsory display of the crucifix represents a violation of the Convention, is right. Nevertheless, some criticism to the decision may be raised. The general concept of neutrality adopted in a dictum of the judgment<sup>11</sup> by the ECtHR has the paradoxical effect of neglecting the very same value of pluralism, which according to the interpretation of the court, is an important element of the democratic regime envisioned by the Convention. To this extent I argue, contrary to the court's stand, that parents' should be free to require the display of the different religious symbols. This is consistent with the pluralistic democratic principle as envisioned by the ECHR and with the principle of the "best interest of the child". I also argue that public schools must accept a degree of religious expression within their walls.

## 2 - National proceedings

Ms Lautsi challenged the board's refusal to remove the crucifix in several national proceedings. Before the Regional Administrative Tribunal of Veneto, Ms Lautsi based her complaint on the violation on the fundamental constitutional principle of *laicità*, on the violation of several articles of the Italian Constitution and arts. 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>12</sup>.

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I. T. PLESNER, *Legal limitations to Freedom of Religion or Belief in School Education*, in *Emory International Law Review*, 19 (2), 2005, pp. 557- 587.

<sup>11</sup> See para. 56 of the judgment.

<sup>12</sup> See para. 9 of the judgment. A general assessment concerning the Italian situation in church/state affairs is given by M. VENTURA, *The Permissible Scope of*



The compulsory display of the cross in public school classroom was based on two royal decrees approved during the Fascist regime. For this reason, Ms Lautsi asked the Administrative Tribunal to defer the case to the Constitutional Court in order to scrutinize the constitutionality of the two royal decrees<sup>13</sup>.

Once seized, the Constitutional Court, given the statutory nature of the two royal decrees, declared a lack of jurisdiction and did not issue any decision on the merit of the case. It is in fact competence of the administrative judge to annul this kind of decrees<sup>14</sup>. The case was therefore resumed before the Regional Administrative Court which issued a decision on merits.

According to the Regional Administrative Tribunal the compulsory display of the crucifix in public schools complies with the principle of *laicità*. The court affirmed that such display is a representation of the principle itself<sup>15</sup>.

The Supreme Administrative Tribunal dismissed the appeal. According to the court such a display expresses: "the crucifix (...) may be legitimately displayed in the public schools because it does not clash with the principle of *laicità*, but on the contrary, it actually affirms it"<sup>16</sup>.

### 3 - The case before the ECtHR

Having exhausted all the domestic remedies, Ms Lautsi lodged a complaint before the ECtHR.

In addition to her original claim, Ms Lautsi claimed a violation of art. 2 of the First Optional Protocol<sup>17</sup> and art. 9<sup>18</sup> of the Convention<sup>19</sup> before the ECtHR on behalf of her children.

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*Legal Limitations on The Freedom of Religion or Belief in Italy*, in *Emory International Law Review*, 19 (2), 2005, pp. 913-928.

<sup>13</sup> See para. 10 of the judgment.

<sup>14</sup> See para. 12 of the judgment.

<sup>15</sup> See para. 15 of the judgment.

<sup>16</sup> T.A.R. 17 March 2005, n. 1110, para. 16.1.

<sup>17</sup> According to art. 2 of the First Protocol: "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 religions and philosophical convictions".

<sup>18</sup> According to art. 9 of the Convention: "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. 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



The main argument supporting Ms Lautsi's claim was that the crucifix is to be perceived as a fundamentally religious symbol. Given the compulsory nature of its display, the crucifix might be perceived as favouritism towards a particular religion by the State, moreover, exposing the students to the crucifix might be an object of psychological pressure, forcing them to conform to the view of the majority<sup>20</sup>.

On the other side, the Government argued that, first of all, the crucifix is not to be perceived only as a religious symbol. Besides the traditional meaning, a broader cultural signification has to be accorded to it. According to the Government the crucifix conveys a message of humanist and democratic values. Given this broader meaning the presence of the crucifix in public schools did not violate the principle of *laicità*. Contrary to the request of Ms Lautsi, the Government maintained that the crucifix is a symbol of the very same principle<sup>21</sup>.

Besides the argument based on the semiotic significance of the crucifix, the Italian government also raised other objections to the arguments advanced by Ms Lautsi. They argued that the compulsory display of the crucifix did not violate fundamental constitutional provisions because it did not involve a real coercion, as the students were not forced to worship it. Moreover, students in Italian public schools are free to choose their own religion and the parents are free to choose to enrol their children in private schools<sup>22</sup>.

The traditional argument based on the doctrine of the margin of appreciation was also raised by the Government. They argued that given the lack of consensus among the State partners on the issue at stake, the Court should be deferential towards the different policies as elaborated by the Member States<sup>23</sup>.

Finally, the Government argued that the decision of the Italian state was also based on the necessity to reach a compromise with the parties of Christian inspiration.

#### 4 - The decision of the court

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public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others".

<sup>19</sup> See para. 27 of the judgment.

<sup>20</sup> See para. 31-32 of the judgment.

<sup>21</sup> See para. 35 of the judgment.

<sup>22</sup> See para. 36 of the judgment.

<sup>23</sup> See para. 39-41 of the judgment.



In order to assess the claim of violation, the second section of the ECtHR first reconstructed the principles applicable to the case, as derived by the previous interpretations of the different provisions of the Convention. According to the judges several principles may be derived from the court case law:

a) Art. 2 of the First Optional Protocol represents a twofold dimension. It protects the child's fundamental right to education but also the parent's right to educate their children according to their own philosophical and religious convictions. It must be read in conjunction with art. 8, 9 and 10 of the Convention<sup>24</sup>;

b) The second sentence of art. 2, aimed at safeguarding pluralism in education is fundamental to the maintenance of a democratic society. No difference can be made between public and private education. This aim is better achieved, according to the court, within a public educational system of education<sup>25</sup>;

c) Given the previous aim, and in order to respect the parent's beliefs, the classroom has to be an open environment that favours inclusion rather than exclusion. No proselytism is allowed within the schools<sup>26</sup>;

d) Within the domain of teaching, all the subjects have to be thought according to a methodology *objective, critical and pluralistic*. Any activity aimed at indoctrinating the children would signify a violation of the Convention<sup>27</sup>; and

e) Art. 9 has a twofold dimension. It guarantees the right to believe or not to believe in any religion, making the negative dimension of this right in need of protection. Therefore in an environment like public schools where young students are particularly vulnerable, the state may not impose any belief. A strong policy of neutrality must be pursued. This is the only way to guarantee pluralism in education.<sup>28</sup>

Building on these principles, the ECtHR tried to evaluate if the Italian decrees requiring the display of the crucifix in public schools could be considered as a violation of the Convention. It asked whether the Italian State was behaving with the aim of ensuring an *objective*,

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<sup>24</sup> The court refers here to the previous case-law. Notably the cases *Kjeldsen, Busk Madsen and Pedersen v Denmark*, ECtHR, 7 December 1976; *Campbell and Cosans v United Kingdom*, 25 February, ECtHR, 1982, *Valmiskis v Greece*, ECtHR, 18 December 1996, *Folgero v Norway*, ECtHR, 29 June 2007.

<sup>25</sup> See para. 47 b) of the judgment.

<sup>26</sup> See para. 47 c) of the judgment.

<sup>27</sup> See para. 47 d) of the judgment.

<sup>28</sup> See para. 47 e) of the judgment.





*critical* and *pluralistic* teaching as required by art. 2 of the First optional protocol<sup>29</sup>.

The particular nature of the crucifix as a religious symbol had to be taken into account. Answering to the arguments by the Italian government, the court was clear in stating that the crucifix has a primary religious meaning. The ECtHR therefore accepted the argument advanced by the applicant, according to which, when the Italian government requires the compulsory display of the crucifix in the classroom it favours Catholicism as compared to other religious faiths. Moreover, considering that the crucifix is present in every class, it was considered by the court as a "*signe extérieur fort*"<sup>30</sup>.

Within the context of public education it is perceived as a part of the school environment. This might lead the students to think that they are being educated in an environment hegemonized by a single religion. This may result in discrimination towards students belonging to minority religion or atheists<sup>31</sup>.

In the paragraph 56 of the judgment, the ECtHR stated that no religious symbol has to be allowed within the classrooms in order to respect the negative side of the religious freedom guaranteed by the Convention. Therefore not only a compulsory display is banned but also a display upon request of the parents or on teacher's discretion. Having regard to the particular presence of Christian political parties in Italy, the Court reiterated that no reason for compromise with these parties may allow the exposition of such symbols.

How can the compulsory display of the religious symbol of a given religion (Catholicism) be compatible with the aim of educational pluralism as described by the Convention? For the court, the Italian policy regarding the display of the crucifix in public schools consists in violation of parent's right to ensure their children an education according to their own convictions and children's right to believe or not to believe<sup>32</sup>.

Therefore the ECtHR declared a violation of art. 2 of the First Protocol in conjunction with art. 9 of the Convention. The court declared that it was not necessary to assess the claim for discrimination under art. 14 read either alone or in conjunction with art. 2 of the First optional protocol or art. 9<sup>33</sup>.

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<sup>29</sup> See para. 49 of the judgment.

<sup>30</sup> See para. 50-54 of the judgment

<sup>31</sup> See para. 55 of the judgment.

<sup>32</sup> See para. 56-57 of the judgment.

<sup>33</sup> See para. 58-62 of the judgment.



Italy was condemned to non-pecuniary damages for the sum of 5,000 euros.

## 5 - The reaction to the decision

The decision from the ECtHR provoked a real thunderstorm. At least two main waves can be tracked: the reaction of the national media and the counter-reactions to the judgment by local authorities.

The day after the announcement of the decision, the most important newspapers covered, with extensive comments, the ECtHR ruling.

Prof. Carlo Cardia commenting for the Italian Bishops' conference newspaper *"L'Avvenire"* wrote: "A Europe that would deny, neglect or abolish her Christian heritage would be a No man's land"<sup>34</sup>. Highly critical comments were also published by *L'Osservatore Romano* (The official Holy See newspaper),<sup>35</sup> and by other newspapers<sup>36</sup>. Some newspapers and scholars were less critical.<sup>37</sup> For an external observer, these reactions highlight the important and divisive nature of the cultural war on religious symbols among the elite. Polls in the days following the ECtHR decision also confirmed the argument already advanced by Hunter. He argues that in the cultural wars, most citizens occupy a middle ground between the polarizing positions of the elite. In Italy at least, most citizens (60%) were found to be against the total banning of the crucifix from the schools<sup>38</sup>. Of course, it cannot be ignored that the Vatican and Catholic religion in Italy are a very influential source of identity for the people. Moreover, part of the church hierarchy is stressing the fact that Catholicism represents "the

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<sup>34</sup> C. CARDIA, *Quei giudici che vorrebbero farci tutti più poveri*, in *Avvenire*, 5/11/2009.

<sup>35</sup> G. FIORENTINO, F.M. VALIANTE, *Il crocifisso, i giudici e Natalia Ginzburg*, in *L'Osservatore Romano*, 5/11/2009.

<sup>36</sup> See for instance S. STEFANI, *La corte di Strasburgo e quella provocazione troppo pesante*, in *La Padania*, 5/11/2009; A. SOCCI, *Così cancellano la nostra cultura*, in *Libero*, 5/11/2009; L. VOLONTÉ, *Una sprovvedutezza giacobina per eliminare Cristo dalla vita reale*, in *Il Tempo*, 4/11/2009..

<sup>37</sup> See M. AINIS, *Nessuna legge lo prevede*, in *La Stampa*, 4/11/2009; S. RODOTA', *La battaglia su un simbolo*, in *La Repubblica*, 4/11/2009, A. MELLONI, *Il crocifisso e la caccia ai simboli che prova soltanto danni*, in *Il Corriere della sera*, 4/11/2009, T. GROPPi, *Quella Corte che ci guarda dall'Europa*, in *L'Unità*, 6/11/2009. Gianfranco Macrì suggests an intermediate position according to which the fascist royal orders are already repealed by the new Constitutional order. See G. MACRÌ, *Crocifisso e laicità: non precipitiamo negli slogan*, in *Farefuturowebmagazine*, 9/11/2009.

<sup>38</sup> EURISPES, *Rapporto Italia 2010*.





identity" of the Italian people, thereby, promoting Catholicism from a religion to an ethnic factor.

Local authorities tried to counter-react to the judgment by approving municipal decrees in order to avoid the enforcement of the Strasbourg's ruling. After two weeks, a bill was also deposited in the Italian Parliament and a resolution on the judgment, sponsored by the European Popular Party, was submitted to the European Parliament.

This counter-reaction to the judgment highlight the complexity of a regime, such as the ECHR, where the enforcement is still largely political and not based on a real power of the court<sup>39</sup>. Even if the rate of compliance is normally very high in particular cases, such as this one, the process of enforcement may become very difficult<sup>40</sup>. Moreover this decision may result in a rebound effect: several local bodies have enacted bylaws in order to oblige public schools to display the crucifix. Paradoxically, after the judgment, there might be more crucifixes displayed in public schools.

## PART II: A BRIEF ANALYSIS OF THE JUDGMENT

### 6 - The composition of the court

Before entering into the merit of the case, a look at the composition of the court that decided the *Lautsi* case may be useful. In fact, this decision represents, within the European context, another fundamental building block in the process of the *judicialization of political-religious issues*. According to Ran Hirschl, this process involves a transfer of fundamental issues debated in society from ordinary politics to the courts and its judges<sup>41</sup>.

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<sup>39</sup> As the last report of the Parliamentary Assembly of the Council of Europe puts it: "The "subsidiary nature" of the Strasbourg system dictates that ultimate responsibility for ensuring the rights and freedoms guaranteed in the Convention rests with the state parties".

See **COMITEE ON LEGAL AFFAIRS AND HUMAN RIGHTS**, *Implementation of judgments of the European Court of Human Rights. Progress report*, p. 1, 31/8/2009. Available at: [http://assembly.coe.int/CommitteeDocs/2009/ejdoc36\\_2009.pdf](http://assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf).

<sup>40</sup> This is the case for several judgments. As the report highlights: "In preparing this Progress report the objective application of standard criteria has revealed that the problem of non-implementation of Strasbourg judgments is far more graver and more widespread than previous reports have disclosed", above, p. 2.

<sup>41</sup> See **R. HIRSCHL**, *Toward Juristocracy. The origins and consequences of New Constitutionalism*, Harvard University Press, Cambridge, 2004. See also **R. HIRSCHL**,



With the increasing religious pluralism in Europe, the ECtHR becomes a leading player in the solution of difficult cultural conflicts. A brief analysis of the background of the judges composing the bench, or of the previous positions or scholarly writing might illuminate some aspects of their decision and stand on this dividing issue<sup>42</sup>.

Importantly, several American scholars have shown that the personal background of the judges might have an impact in such delicate cases<sup>43</sup>. It is interesting to consider whether the same theory applies to the ECtHR. Unfortunately, contrary to U.S. Supreme Court judges' nomination and appointment, very little information is available on the personal background of the judges or on how the procedures followed at the national level are organized in order to nominate the judges that will later be appointed by the Parliamentary Assembly of the Council of Europe. Moreover the verbatim records of the hearings before the Sub-committee for the appointment of judges are not disclosed<sup>44</sup>. This lack of transparency does not help to build confidence in the court in such a crucial historical moment.

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*The judicialization of mega-politics and the rise of political courts*, in *Annual Review of Political Science*, 11, 2008, pp. 93-118 and **R. HIRSCHL**, *The Judicialization of Politics*, in **K. WHITTINGTON, R. D. KELEMEN, G. A. CALDEIRA** (ed.), *Oxford Handbook of Law and Politics*, Oxford University Press, Oxford, 2008, pp. 119-141.

<sup>42</sup> Few studies have been so far published in Europe in order to analyze the judges' background and its influence on the decisions of the court. A pioneristic study is the one by **N. L. AROLD**, *The legal culture of the European Court of Human Rights*, Martinus Nijhoff Publishers, Leiden/Boston, 2007.

<sup>43</sup> See for instance **T. BERG, W. ROSS**, *Some Religiously Devout Justices: Historical Notes and Comments*, in *Marquette Law Review*, 81, 1997/1998, pp. 383-415. See also the account given by **J. SEKULOW**, *Witnessing their faith. Religious Influence on Supreme Court Justices and Their opinions*, Rowan and Littlefield, New York, 2005.

<sup>44</sup> The Council of Europe is working on these aspects trying to improve the different procedures. See **SUB-COMMITTEE ON THE ELECTION OF JUDGES TO THE EUROPEAN COURT OF HUMAN RIGHTS**, *Procedure for electing judges to the European Court of Human Rights*, 26/08/2009, available at: [http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/CommitteeDocs/2009/20090701\\_ajdoc34\\_2009.pdf](http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/CommitteeDocs/2009/20090701_ajdoc34_2009.pdf) ; **COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS**, *Nomination of candidates and election of judges to the European Court of Human Rights*, Preliminary Draft Report, 3/09/2009, available at: [http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20080903\\_ajdoc34\\_2008.pdf](http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20080903_ajdoc34_2008.pdf); **COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS**, *Nomination of candidates and election of judges to the European Court of Human Rights, Part B of the Appendix to Assembly Doc 11767: Overview of the member states' replies to a questionnaire*, 1/12/2008, available at: [http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20081201\\_ajdoc52.pdf](http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20081201_ajdoc52.pdf) .



Nevertheless, the composition of the Second Section of the ECtHR includes several members that, at least as far as it concerns, the available materials show an inclination toward strong separationism or toward a greater role for the ECtHR to play on this issue, implying a repeal of the doctrine of the “margin of appreciation”<sup>45</sup>. This may assist to explain certain aspects of the outcome of this decision.

For instance, Judge Sajo has been a strong advocate of separationism. In recent publications he has advanced a strong idea of “constitutional secularism”<sup>46</sup>.

Judge Tulkens also offers an interesting insight. She has been strongly advocating a more robust protection of religious freedom at the European level. In 2005, being the only dissenter in the *Sahin* case<sup>47</sup>, she opposed the Turkish policy of strong secularism but argued for a stronger European level of protection:

“(...) the issue raised in the application, whose significance to the right of freedom guaranteed by the Convention is evident, is not merely a local issue, but one of importance to all member States, European supervision cannot therefore, be escaped simply by invoking the margin of appreciation”<sup>48</sup>.

In the same issue of the *Cardozo Law Review* where Judge Sajo wrote on Constitutional secularism, Judge Tulkens advanced the idea that nevertheless the necessary self-restraint imposed by the doctrine of margin of appreciation, the court is developing a “vision of religious freedom”<sup>49</sup>.

Among the other judges, it is worth pointing out at the presence of Judge Karakas from Turkey. In Turkey, the judiciary traditionally belongs to the most secular part of the society. The report of the Council

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<sup>45</sup> The Second Section of the ECtHR is composed by: Francoise Tulkens (Belgium), Ireneu Cabral Barreto (Portugal), Vladimiro Zagrebelsky (Italy), Danute Jociene (Lithuania), Andras Sajo (Hungary), Isil Karakas (Turkey).

<sup>46</sup> See **A. SAJO**, *Constitutionalism and secularism: The need for public reason*, in *Cardozo Law Review*, 30 (6), 2009, pp. 2401- 2429; **A. SAJO**, *Preliminaries to a concept of Constitutional secularism*, in *International Journal of Constitutional Law*, 6 (3-4), 2008, p. 605-629; Lorenzo Zucca wrote a reply to this article see **L. ZUCCA**, *The crisis of the secular state-A reply to Prof. Sajo*, in *International Journal of Constitutional Law*, 7 (3), 2009 pp. 494-514, to which Sajo replied again. See **A. SAJO**, *The crisis was not there: Notes on a Reply*, in *International Journal of Constitutional Law* 7 (3), 2009, p. 515-528.

<sup>47</sup> *Sahin v Turkey*, ECtHR Grand Chamber, 11/10/2005 (challenge to a Turkish law which banned the wearing of the Islamic headscarf at universities and other public educational institution).

<sup>48</sup> *Sahin v Turkey*, ECtHR Grand Chamber, 11/10/2005, Tulkens dissenting.

<sup>49</sup> **F. TULKENS**, *The European Convention on Human Rights and Church-State Relations: Pluralism vs Pluralism*, in *Cardozo Law Review*, 30 (6), 2009, pp. 2575- 2592.



of Europe does not help us in tracking the roots of her election because Turkey did not reply to the questionnaire<sup>50</sup>. To this respect, more transparent policies would only enhance the reputation and confidence in the court<sup>51</sup>.

## 7 - The meaning of the crucifix

As for the more substantial issues, the meaning of the crucifix was a central issue widely debated among the parties in the case. While Ms Lautsi claimed the absolute religious nature of its meaning, the Italian government was keen on attributing to the crucifix a general cultural meaning. The Court, siding with Ms Lautsi, attributed a predominant religious meaning to the symbol. Importantly, the debate on the

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<sup>50</sup> See **COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS**, *Nomination of candidates and election of judges to the European Court of Human Rights, Part B of the Appendix to Assembly Doc 11767: Overview of the member states' replies to a questionnaire*, above n. 44, p.16. It is important to bear in mind that also the election of the Italian judges has been described as "ad hoc and without formal legal basis". See **COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS**, *Nomination of candidates and election of judges to the European Court of Human rights*, 1/12/2008, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11767.pdf>, footnote 43.

<sup>51</sup> Compared to the U.S. Sup. Court, I think the point is fairly made, even if ironic by Lord Hoffman: "The court now has 47 judges, one for each member state of the Council of Europe. One country, one judge; so that Liechtenstein, San Marino, Monaco and Andorra, which have a combined population slightly less than that of the London Borough of Islington, have four judges and Russia, with a population of 140 million, has one judge. The judges are elected by a sub-Committee of the Council of Europe's Parliamentary Assembly, which consists of 18 members chaired by a Latvian politician, on which the UK representatives are a Labour politician with a trade union background and no legal qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practiced. They choose from lists of three drawn by the governments of the 47 members in a manner which is totally opaque. It is therefore hardly surprising that to the people of the United Kingdom, this judicial body does not enjoy the constitutional legitimacy which the people of the United States accord to their Supreme Court. This is not an expression of populist Euroscepticism. Whatever one may say about the wisdom or even correctness of decisions of the Court of Justice in Luxembourg, no one can criticise their legitimacy in laying down uniform rules for the European Union in those areas which fall within the scope of the Treaty. But the Convention does not give the Strasbourg court equivalent legitimacy." See **LORD HOFFMAN**, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19/3/2009, available at: [http://www.jsboard.co.uk/downloads/Hoffmann\\_2009\\_JSB\\_Annual\\_Lecture\\_Universality\\_of\\_Human\\_Rights.doc](http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc).



meaning of the crucifix is not only a European one. In the United States the same debate was held around the meaning of the cross.

During the oral argument in *Salazar v Buono*, Justice Scalia argued that the cross might have a cultural meaning capable of representing all those who died in the war<sup>52</sup>. Replying to Scalia's question the lawyer representing Buono argued:

"(...) The cross is the most common symbol of the resting place of the Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew. So it's the most common symbol to honor Christian".<sup>53</sup>

Justice Scalia replied:

"I don't think you can leap from that to the conclusion that the only war dead that that cross honours are the Christian war dead. I think that's an outrageous conclusion".<sup>54</sup>

The lawyer closed the exchange claiming:

"(...) there is a reason the Jewish veterans came in and said we don't feel honoured by this cross. This cross can't honor us because it is a religious symbol of another religion".<sup>55</sup>

This indicates that even though this issue was raised in two different social contexts and in two different legal orders, the question raised is the same. Is the crucifix/cross a religious symbol of a particular religion? Or is it only a cultural symbol, therefore capable at representing different traditions?

As we have seen, the ECtHR accorded to the crucifix a predominant religious meaning. It therefore represents, as interpreted in this case, a particular religious tradition.

In this debate I tend to side with Alexander Stummvoll that recently claimed: "I'm puzzled by the extent to which Christians all over Europe have defended a cultural interpretation of the crucifix"<sup>56</sup>.

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<sup>52</sup> In *Salazar v Buono* the cross erected in the Mojave Desert was placed in 1934 upon a rock as a symbol representing all dead during the First World War.

<sup>53</sup> *Salazar v Buono*, oral arguments, verbatim transcripts. available at: [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-472.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-472.pdf) p. 38

<sup>54</sup> Above.

<sup>55</sup> Above, p. 39.

<sup>56</sup> **A. STUMMVOLL**, *Christianity in Europe: A part of or apart from culture?*, available at: <http://www.csmonitor.com/Commentary/Opinion/2009/1205/p09s02-coop.html>.



From a merely religious point of view, arguing that the crucifix is a cultural and not a religious symbol downgrades the meaning of a symbol that for believers is supposed to be of great importance.

## 8 - The holding of the case: did the court reach the right decision?

As a matter of principle, the general argument against the compulsory display of the crucifix may be shared. As Justice O'Connor has argued in *County of Allegheny v ACLU*:

“government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non adherents that they are outsiders or less than full member of the political community”<sup>57</sup>.

If, in a Liberal Democracy, the “government is not to be trusted as arbiter of religious (or antireligious) truth”<sup>58</sup>, this basic principle can be shared by all the Liberal-Democratic States member of the Council of Europe<sup>59</sup>. On this specific point, arguments based on the role of the margin of appreciation<sup>60</sup> in the system of the Convention have been

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<sup>57</sup> *County of Allegheny v ACLU*, 492 U.S. 573 (1989), O'Connor concurring.

<sup>58</sup> **M. PERRY**, *Liberal Democracy and the Right to Religious Freedom*, in *The Review of Politics*, 71, 2009, pp. 1-15, but see also in general **M. PERRY**, *The Political morality of Liberal Democracy*, Cambridge University Press, Cambridge, 2010. According to Perry a liberal democracy is: “a democracy committed, first, to the proposition that each and every human being has inherent dignity and is inviolable and, second, to certain human rights against government that is, against law makers and other governments officials such as the right to freedom of religion”, p. 11-12. As Perry points out this principle was also endorsed by the Catholic Church during the Second Vatican Council in the Declaration *Dignitatis Humanae*: “In *Dignitatis Humanae* the Church finally came round to embracing the right to religious freedom as a right that, given the inherent dignity and inviolability of every human being, should be universally legislated (...) An overwhelming majority of the cardinals and bishops at the council (2308 to 70) accepted an argument the Church had long rejected: liberal democracy's argument for the right to religious freedom. In particular, they accepted liberal democracy's claim that government is not to be trusted as an arbiter of religious (or anti-religious) truth.”, p. 105, 110.

<sup>59</sup> See for instance **PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE**, *Recommendation 1369 “Religion and Democracy”*, 1999. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EREC1396.htm>

<sup>60</sup> The margin of appreciation doctrine is a margin of judicial discretion. As the ECtHR is a supranational court, it recognized a margin of self-restraint and deference towards national courts in earlier case law. In *Handyside v United Kingdom* the ECtHR argued that: “By reason of their direct and continuous contact with the vital





raised. However, I'm inclined to argue that a compulsory display of a symbol of a specific religious symbol represents a violation of the basic Liberal-Democratic principle according to which the government may not compel any religious exercise. When analysing the system for the protection of rights envisioned by the Convention, an argument based on the doctrine of consensus may be asserted<sup>61</sup>. Again, from a theoretical point of view, a basic principle of a Liberal-Democratic system is that the role of the government is not to promote or endorse a specific religious faith.

When religion and the State interact, no coercion should be possible. Therefore, taking into account a "theoretical notion" of consensus among Liberal-Democratic regimes, no margin of appreciation needs to be allowed when coercion is at stake.

However the court's stand on this point in the case remains problematic. For the sake of transparency in decision making, it would have been better for the ECtHR to justify the abandonment of the margin of appreciation doctrine on this issue. For instance, an argument

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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", par. 48, 1976. In *Sahin v Turkey*, ECtHR Grand Chamber 11/10/2005, the Court argued: "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance". On the margin of appreciation doctrine see in general **G. LETSAS**, *A Theory of interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, 2007 (chapter 4).

<sup>61</sup> As Kanstantsin Dzehtsiatou has argued: "The European Court has not used a unified terminology in respect of comparative analysis and European consensus. The Court has referred to several terms to indicate the presence or absence of a common European approach (...) They indicate the Court's acknowledgment of commonly accepted values or procedures". See **K. DZEHTSIATOU**, *European Consensus: a way of reasoning*, University College Dublin Working papers in Law, Criminology and Socio-Legal Studies, Research Paper No. 11/2009, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1411063](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411063). Besides the traditional socio-political and legal consensus that involves a comparative analysis between the different States, Dzehtsiatou identifies also other kind of consensus: 1) International consensus identified by International treaties; 2) internal consensus in the state in question; 3) expert consensus; 4) consensus among the judges of the European Court. On the role of "consensus" within the Convention system see **EUROPEAN COURT OF HUMAN RIGHTS**, *Dialogue between Judges*, 2008. Available at: [http://www.echr.coe.int/NR/rduonlyres/D6DA05DA-8B1D-41C6-BC38-36cCA6F864E6A/0/Dialogue\\_between\\_judges\\_2008.pdf](http://www.echr.coe.int/NR/rduonlyres/D6DA05DA-8B1D-41C6-BC38-36cCA6F864E6A/0/Dialogue_between_judges_2008.pdf) and **G. LETSAS**, *A Theory of interpretation of the European Convention on Human Rights*, above, (chapter 6).



based on the notion of the Convention as a “*living instrument*” could have helped the reasoning of the court<sup>62</sup>.

While reading the judgment, the court does not really take a position on this central issue. Justice Rozakis<sup>63</sup>, writing extra judicially, has recently argued that:

“(...) although the margin of appreciation continues to be invoked in many cases, the frequency of its application is constantly losing ground”.<sup>64</sup>

The judgement presumes that the ECtHR rejects this well-established doctrine of self-restraint, but no reason is given in the text for this departure from previous case-law<sup>65</sup>. It is beyond the scope of this note to assess the proper role of the court in the Convention

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<sup>62</sup> I’m fully aware of the fact that the ECtHR, being a “human institution”, has shortcomings to be improved that are the usual business of the court, therefore even if I question the legitimacy of a certain position, I have argued that the protection offered by the court can be both “effective and progressive”. See **P. ANNICCHINO, J. LESLIE**, *Editorial*, in *University College London Human Rights Review*, 2, 2009, p. IV-VI, but see also **A. MOWBRAY**, *The Creativity of the European Court of Human Rights*, in *Human rights Law Review*, 5, (1), 2005, pp. 57-79. Against this interpretation see **LORD HOFFMAN**, above n. 50, “The proposition that the Convention is a “living instrument” is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by “European public order”, p. 21. See also **C. ROZAKIS**, *Is the case law of the European Court of Human Rights a Procustean Bed? Or is it a contribution to the Creation of a European Public Order? A Modest reply to Lord Hoffman’s criticisms*, in *University College London Human Rights Review*, 2, 2009, p. 51-69 and **E. METCALFE**, *The strange Jurisprudence of Lord Hoffman: Human Rights and the International Judge*, in *University College London Human Rights Review*, 2, 2009, p. 35-50.

<sup>63</sup> Vice-President of the ECtHR.

<sup>64</sup> **C. ROZAKIS**, *Is the case law of the European Court of Human Rights a Procustean Bed? Or is it a contribution to the Creation of a European Public Order? A Modest reply to Lord Hoffman’s criticisms*, above n. 62, p. 65.

<sup>65</sup> Lord Hoffman has recently argued that: “The Strasbourg court (...) has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights. (...) the Court has not taken the doctrine of appreciation nearly far enough. It has been unable to resist the temptation to aggrandize its jurisdiction to impose uniform rules on Member State. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.” See **LORD HOFFMAN**, above n. 50. Against this position see **C. ROZAKIS**, *Is the case law of the European Court of Human Rights a Procustean Bed? Or is it a contribution to the Creation of a European Public Order? A Modest reply to Lord Hoffman’s criticisms*, above n. 62, and **E. METCALFE**, *The strange Jurisprudence of Lord Hoffman: Human Rights and the International Judge*, above n. 62.



system<sup>66</sup>, however as I have already argued, this lack of justification represents a flaw in the judgment.

## 9 - The concept of neutrality

This case also sheds light on the conception of neutrality held by the ECtHR. To this extent paragraph 56 of the judgment is particularly revealing. As presented in the case, the concept of neutrality applied by the Court represents a transposition of the French version of strong secularism<sup>67</sup>. The Court aimed at protecting particularly the negative side of religious freedom, therefore adopting a critical stand towards any kind of religious symbols within public schools. In my view, a better approach would have allowed the court to distinguish between the finding of a violation in this case of compulsory display of the crucifix, such as this one, on the basis of the principle widely shared among Liberal-Democracies according to which religious exercise on coercion from the State should be possible, but with a degree of flexibility on the freedom to display the different religious symbols according to students' and parents' request. Paragraph 56 instead seems to suggest a total ban for religious symbols in public schools.

A more "religion-friendly" interpretation would have also ensured a better protection of the "best interest of the child" as generally outlined by the UN Convention on the Rights of the Child<sup>68</sup>. As the public school is an embryonic representation of the wider society, it is in the children's best interest to be exposed to the different religious faiths that compose the society in which they are living, rather

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<sup>66</sup> Using Bickel's terminology, Susanna Mancini describes the role of the ECtHR as "counter-majoritarian". From an institutional point of view, I think that the role that the ECtHR has in the Convention system cannot be compared to the role that the U.S. Sup. Court has within the system of separation of powers provided by the U.S. Constitution. See **S. MANCINI**, *La supervisione europea presa sul serio: la controversia sul crocifisso tra margine di apprezzamento e ruolo contro maggioritario delle corti*, available at: <http://www.associazionedeicostituzionalisti.it/dottrina/libertadiritti/Mancini.pdf>, forthcoming in *Giurisprudenza costituzionale*, 5, 2009. See also **A. BICKEL**, *The Least dangerous branch: The Supreme Court at the bar of Politics*, Yale University Press, New Haven, 1986.

<sup>67</sup> See among the others **B. C. PONT, J. GUNN**, *Dieu en France et aux États-Unis. Quand les mythes font la loi*, Berg International, Paris, 2005.

<sup>68</sup> Art. 3 of the Convention provides that: "The best interests of the child must be a top priority in all actions concerning children". I owe this point to Prof. Francesco Francioni.



than confronting the problematic idea of neutrality represented by a naked wall<sup>69</sup>.

## 10 - Conclusion

While the holding of the case may be shared, even if the problems of justification concerning the abandonment of doctrine of the margin of appreciation seems to remain, the total ban of religious symbols within public schools, as one is tempted to deduce from paragraph 56 of the judgment, does not seem to be justified.

In my view, the “naked public school”<sup>70</sup> envisioned by the Court does not help in preparing responsible children for a democratic society. Democracy is not an empty space, but a place where respect for differences must be pursued<sup>71</sup>. Analyzing the concept of pluralism in the case law of the ECtHR, Aernout Nieuwenhuis has argued that:

“Pluralism can be defined as diversity of values, opinions, and social groups and the absence of predominance of particular values, opinions or groups”<sup>72</sup>.

It is hard to see how this decision, which practically imposes top-down uniformity, is compatible with the principle of pluralism. How is a decision that avoids the discussion on religious symbols consistent with such an aim? Isn't it in the “best interest of the child” to question the presence of different religious symbols in the class? Isn't this a way to start a real process of mutual understanding between citizens belonging to different religions? The decision seems to suggest the idea that the relationship between the State and the individual has no intermediate communities.

We know very well instead, to use an expression coined by Robert Cover, that “paideic” communities to which the different

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<sup>69</sup> For instance according to Art. 14 of the Convention: “Every child has the right to think and believe what they want and also to practise their religion, as long as they are not stopping other people from enjoying their rights. Governments must respect the rights of parents to give to their children guidance about this right”.

<sup>70</sup> See **R. J. NEUHAUS**, *The naked public square: Religion and Democracy in America*, Wm. B. Eedermans Publishing, Grand Rapids, 1986.

<sup>71</sup> For instance according to Recommendation 1369: “Democratic States, whether secular or linked to a religion must allow all religions that abide the conditions set out in the European Convention on Human Rights to develop under the same conditions, and enable them to find an appropriate place in society” (6), above n. 59.

<sup>72</sup> **A. NIEUWENHUIS**, *The Concept of Pluralism in the Case-Law of the European Court of Human Rights*, in *European Constitutional Law Review*, 3, 2007, pp. 367- 384.



individuals belong do exist<sup>73</sup>. The “imperial universe” of the State needs to take them into account. As Cover has argued:

“The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining “weak” forces. They are virtues that are justified by the need to ensure the coexistence of words of strong normative meaning. The systems of normative life that they maintain are the products of “strong” forces: culture-specific designs of particularist meaning”<sup>74</sup>.

If public schools in Europe do not want to be absent in the wider conversation that we are having on the role of religious communities within our Liberal-Democratic orders, a degree of the expression of religious belonging in our public schools must be accepted. No doubt, as Christian Europe is a widely secularized land, it is likely that classes will not be full of crucifixes. Moreover, Christian religious groups have widely accepted the principle of our Liberal democracies. Strategically, the approach that I suggest is useful if we take into account the new waves of Muslim immigrants that are increasingly joining the classes. They must feel that European public schools are not hostile towards their religious feelings. If interpreted, as I do, as a total ban against any religious symbol the dictum of paragraph 56 seems to suggest otherwise. This interpretation seems to suggest that public institutions are intolerant towards religion incentivizing religious parents to send their children to private religious institution. As a matter of free choice that decision is fine, but should not come as the result of State disengagement with religious communities.

Again, pending the examination of the case before the Grand Chamber of the ECtHR<sup>75</sup>, it must be remembered that from the point of view of the compulsory display of the crucifix, the conclusion reached by the court is the right one. However, the rationale suggested by paragraph 56 of the judgment with its idea of neutrality remains problematic.

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<sup>73</sup> R. COVER, *The Supreme Court 1982 Term Forward: Nomos and Narrative*, in *Harvard Law Review*, 97 (4), 1983, pp. 4-68.

<sup>74</sup> Above, p. 12.

<sup>75</sup> In response to the appeal filed by the Italian government on 28/01/2010, the Court referred the case to the Grand Chamber of the ECtHR.