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THE EUROPEAN COURT OF HUMAN RIGHTS' LAUTSI DECISION:
CONTEXT, CONTENTS, CONSEQUENCES

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Abstract: The paper discusses the context, substance and likely implications of the European Court of Human Rights' very recent but, in our view, historic decision in the case of *Lautsi v. Italy*. The article offers an outline of the case and of the decision's motivation, a presentation of the responses, and a brief discussion of its relevance to the similar Romanian case. We examine in some detail the objections leveled against the ruling, track the progress of the Court's relevant jurisprudence on the issue, and suggest some possible consequences.

Key Words: freedom of religion, religious manifestations, religious displays, crucifixes, public schools, European Court of Human Rights, rights of the child, margin of appreciation, subsidiarity

Journal for the Study of Religions and Ideologies, 9, 26 (Summer 2010): 47-74.

ISSN: 1583-0039 © SACRI

Introduction

The European Court of Human Rights' November 2009 decision in the case of *Lautsi v. Italy* was bold in more than one way. In declaring the presence of crucifixes in compulsory state schools at odds with the European Convention on Human Rights, the Strasbourg Court confronted the sensibilities of many Europeans. The often virulent reaction of politicians and officials all over Europe could have been anticipated from earlier national experiences, such as, for instance, the responses of German politicians and officials to a somewhat similar 1995 decision by the German Constitutional Court. More importantly, the European Court made a bold step towards meeting head-on the implications of its former rulings in religious freedom cases, and in religious display cases particularly. After all, a respected legal scholar had just scolded the Court, no earlier than in 2009, of superficiality: "So far, referring to the national margin of appreciation is the only answer that the European Court of Human Rights has been giving when the issue of banning religious symbols from the public space is at stake."¹

In this paper, we aim to describe the context, substance and likely implications of the historic Lautsi decision. In the first section we provide an outline of the case and of the European Court of Human Rights' judgment. This is followed by a presentation of the responses to the ruling throughout Europe. We then briefly inspect similar decisions in Germany and Romania, as well as a number of arguments raised against the *Lautsi* decision. Finally, we examine in additional detail the progress of the Court's case law towards the decision that is the subject of this article, and eventually offer our views as to its future implications.

The *Lautsi* case and judgment

In 2002 Soile Lautsi, a Finnish-born Italian member of the Italian Union of Atheists, complained to the board of the school attended by her two children that the presence of a crucifix on the walls of every classroom was contrary to the principle of secularism, in which she believed and which she wished to pass on to her children. In Italy, classroom crucifixes are mandatory under two 1920s laws, though since Catholicism ceased to be a state religion the laws have not been systematically enforced. In May 2002, the school board decided to leave the crucifixes in place, and a directive to that effect by the Ministry of Education was dispatched to head teachers.² Mrs. Lautsi complained to the

Veneto Regional Administrative Court the following month, claiming that the school board's decision conflicted with the principles of secularism and state neutrality enshrined in the constitution. In January 2004 the Administrative Court granted Mrs. Lautsi's request that the case be submitted before the Constitutional Court, which in December disclaimed jurisdiction, motivating that the disputed provisions were statutory rather than legislative.³

Thereupon the case was returned to the administrative court, which ruled against the applicant. The Regional Administrative Court held that the crucifix was a symbol of Italian history and culture and of the principles of equality, liberty and tolerance, and thus also of state secularism. The Court accepted the Italian government's argument that the crucifix was not only a religious symbol, but one of the Italian state as well.⁴ In its ruling of 13 February 2006 the Council of State dismissed the applicant's appeal on the ground that the cross was a symbol of the secular values of the Italian constitution. Mrs. Lautsi complained to the European Court of Human Rights (ECtHR), which on 3 November 2009 ruled unanimously that the display of crucifixes in Italian public schools is contrary to children's religious freedom as well as to parents' right to educate them in conformity with their convictions.

In sharp contrast to the decisions of the Italian courts, the European Court of Human Rights based its judgment on the argument that the crucifix would be interpreted by students as a religious sign: "In the Court's opinion, the symbol of the crucifix has a number of meanings among which the religious meaning is predominant."⁵ As such, the cross signals that an educational environment bears a religious imprint ("a sign that the State takes the side of Catholicism"). Indeed, the Court noted, "[t]hat is the meaning officially accepted in the Catholic Church." In the Court's view, this could be disturbing to atheists and to members of various religious minorities. The freedom of religion guaranteed by the European Convention on Human Rights (ECHR) includes the freedom not to believe, which also refers to practices and symbols expressing a particular religious belief. This freedom has to be secured especially when the state is the entity expressing the religious belief, and particularly when the latter is addressed to captive audiences. Public education, with compulsory attendance of classes and its aim to foster students' critical thinking, was judged especially relevant in these respects.⁶ Furthermore, the Court threw doubt on the notion that the display in state schools of symbols associated with Catholicism served the value of pluralism, which

from the Court's case law seems to be "the core principle which organizes Church-State relations."⁷

The Court consequently ruled that the display of religious symbols in state-run institutions restricted the rights of parents to educate children in conformity with their convictions, as well as the right of children to believe or not to do so. The Court held that there had been a violation of Article 2 of Protocol no. 1 (right to education) read in conjunction with Article 9 of the Convention (freedom of thought, conscience, and religion). Under Article 41 of the Convention (just satisfaction), the Court awarded the applicant 5,000 euro as non-pecuniary damage.

Reactions

In Italy, the ruling was greeted with an "uproar".⁸ The reaction of various officials and state agencies responded to a very sensitive public opinion. Soile Lautsi and her husband voiced their feelings towards the various inflamed official statements in an open letter:

In the reaction of the government to the announcement of the sentence handed down by the European Court, there was no respect shown either to our family as private citizens or to the institution of the Court. High-ranking politicians attacked the judgment, resorting to hitherto unheard levels of verbal abuse. One government minister shouted in front of the television cameras of the Italian National Broadcasting Service (RAI): "Death to those people [referring to the plaintiffs in the case, i.e. my family] and those international institutions [i.e., the European Court of Human Rights] that don't count for anything." Not a single member of the government raised a voice against these inflammatory statements.

Instead, following this and similar statements by other government officials, including the mayor of a city (who is also a Parliament deputy representing the Northern League party) who suggested that a bounty be placed on my head (he declared that he would like to put up 'WANTED' posters with my picture on them), my family has received

threatening letters and we have been victims of acts of vandalism.⁹

Besides the rhetorical admonitions, Italy also took official action. It requested, under Article 43 of the Convention, that the case be referred to the seventeen-member Grand Chamber of the European Human Rights Court. Italy's recourse to this provision of the Convention was a formal expression of the Italian state's disagreement with the ECtHR decision.

Officials in countries with a Catholic majority such as Poland, Lithuania or Slovakia, where schools usually place crucifixes on classroom walls, also voiced their opposition to the Court's ruling. The Polish Sejm called on the parliaments in Council of Europe member countries to discuss ways of protecting their Christian heritage. The Committee on Foreign Affairs of the Lithuanian Seimas (the country's unicameral parliament) joined the Polish appeal and expressed its opinion that "the Judgment by the European Court of Human Rights grants a privilege to those who are against any symbols of religious culture in public institutions, thus gives superiority to their rights over the rights of others on no valid grounds and restricts every state's freedom of discretion in its regulation of the matters of conscience and religion in view of its individual cultural, historic, and religious context."¹⁰

As expected, the Vatican reacted to the ruling of the Strasbourg Court on the very day it was made public. Vatican spokesman Rev. Federico Lombardi reiterated the Holy See's established views with respect to the connection between religion and the European identity: "It seems as if the Court wanted to ignore the role of Christianity in forming Europe's identity, which was and remains essential. ... The crucifix has always been a sign of God's love, unity and hospitality to all humanity."¹¹ Lombardi also added a political signal: the European Court had no right to interfere with such a profoundly Italian matter.

The "response model" launched by the Vatican – condemnation, followed by arguments and a message urging the mobilization of church supporters against the opinion of the Strasbourg judges – was followed by major European churches, generally those boasting a strong influence over the lay authorities in their countries. The powerful Polish Catholic Church promptly joined the Vatican, with the Archbishop of Gdansk, Sławoj Leszek Głódź, declaring: "This is another attempt to rip God from the hearts of the people".¹² The Greek Orthodox Church was just as prompt and no less equivocal in its statements. Its head, Archbishop Ieronymos, called for an emergency meeting of the Synod, which

condemned the Court for ignoring both the role of Christianity in forging the European identity, and the fact that it is not only minorities that have rights – majorities do too.¹³

Kyrill, Patriarch of Moscow and all Russia, added the weight of the Russian Orthodox Church to the rebuking campaign. In a letter to Berlusconi posted on the Moscow Patriarchate's official website he noted that "Italy and other European countries' Christian heritage must not be a subject of scrutiny at European rights agencies." He further explained that:

Christian religious symbols present in Europe's public space are part of the European identity, without which the past, the present and the future of this continent are unthinkable. The guaranteeing of a secular nature of the state must not be used as a pretext for infusing an anti-religious ideology that conspicuously breaches peace in society and discriminates against Europe's religious majority – Christians.¹⁴

Finally, there came an assurance of political support: the Russian Orthodox Church in cooperation with the Roman Catholic Church would "inform the world and European communities of its categorical rejection of such judgments and stimulate the condemnation of the European Court of Human Rights' practices in various domains."¹⁵

Last but not least, perhaps also in view of Romania's own pre-existing experience with condemnations of religious displays in state schools, the Romanian Orthodox Church (BOR) also criticized the ECtHR decision. Admittedly, the response was indirect: through civic associations under its control. The mouthpieces of the BOR were, in this case, the association Pro-Vita for Born and Unborn Children and the larger Pro-Vita Federation of Orthodox Organizations, which are under the indirect authority of the ROC.¹⁶ Pro-Vita filed with the ECtHR a petition contesting the Court's competences in the case. It claimed that the decision "is beyond the competence of the Court... The crucifix is representative for the extensive, rich heritage of the Italian Republic and has become a pillar of Italian culture. Its forced removal from public schools constitutes a violation of the international norms governing subsidiarity and of respect for national identity."¹⁷

The decision of the Strasbourg Court was received as a major victory for the global secularist movement. (Soile Lautsi and her husband, *Journal for the Study of Religions and Ideologies*, 9, 26 (Summer 2010)

Massimo Albertin, are members of the Italian Union of Atheists, Agnostics and Rationalists.) Over 100 Italian organizations sent a joint open letter to the Council of Europe, its Parliamentary Assembly, and to the European Court of Human Rights in support of the latter's decision in the *Lautsi* case. Among others, the letter denounced the "vicious and violent" responses in Italy addressed to the "non-believers, non-Catholics, heterodox Catholics and, last but not least, the judges of the European Court of Human Rights", as well as the political influence of the Vatican in Italian life.¹⁸ On 2 January 2010 the European Humanist Federation saluted the decision, which it characterized as of major significance to secularism and human rights.¹⁹ Finally, on getting word of the news that the European Parliament was readying a resolution condemning the ECtHR ruling, the organizations affiliated with the Center for Inquiry, Transnational²⁰ mobilized to issue a statement underlining the significance of the decision and warning about the possible implications of the European parliamentarians' initiative:

through its ruling in the *Lautsi v. Italy* case, the Court has made a decisive step towards the affirmation of state neutrality and impartiality in religious matters, which are fundamental democratic values and a condition for the full respect of freedom of thought, conscience, and religion. ... Emphasizing the incalculable consequences of the condemnation by the European Parliament of the ECtHR judgments in the *Lautsi v. Italy* case, we are hereby appealing to the Brussels MEP's to avoid a position which would render 20 January 2010 a dark moment in the history of human rights on the European continent and elsewhere in the world.

A battle ahead?

The most troublesome reaction to the *Lautsi* decision, namely the initiative of a several members of the European Parliament to turn this institution into a spearhead in the confrontation with the ECtHR, was ultimately avoided. It could have had drastic consequences. In December 2009 several members of the European People's Party Group (Mario Mauro, Simon Busuttil and Manfred Weber) issued a motion for an EP

resolution on the defense of the principle of subsidiarity, calling for “the recognition of this principle by all European institutions and international organizations, including the freedom of Member States to exhibit religious symbols in public places when these symbols represent the tradition and the identity of their people as well as a unifying aspect of a national community.”²¹ The very same month, the proposal for a resolution on behalf of the Europe of Freedom and Democracy Group used more embattled language. The text of the resolution pointed out that “the European Court of Human Rights is not a part of the legal system of the EU”; “call[ed] on the Commission to recognize that such a ruling would be a serious violation of the fundamental principle of subsidiarity”; “insist[ed] that the Commission must refrain from any action that might infringe full respect for the national identities of Member States and their constituent regions”; and “call[ed] on the Commission explicitly to challenge the applicability of such a ruling.” The same day, the Socialists and Democrats’ Group backed, in similar language, the previous motion. The fact that the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament followed this line, somewhat against its political tradition, shifted the balance in the European Parliament in favor of a resolution denouncing the ECtHR ruling.

The Parliament’s Greens and radical left opposed the condemnation. The Liberals’ internal disputes eventually prevented the Alliance of Liberals and Democrats from adopting a motion of their own. On 16 December 2009, several members of the Greens and the Nordic Green Left proposed a joint motion on a Resolution on Human Rights, Religious Symbols and Subsidiarity. Among others, the latter expressed its proponents’ belief that “it should not be compulsory to display religious symbols in premises used by public authorities,” and that “EU Member States have an internal, international and European legal obligation to apply the judgments of the European Court of Human Rights, and calls on the Member States to abide by the latter’s ruling”.²²

Eventually, it was agreed that the proposed resolution should be voted on after the New Year. The resolution was placed on the 20 January 2010 agenda, which was to be discussed during the preceding week. The odds seemed to be in favor of passing a condemnation resolution, so the battle was shifted to the items on the agenda. On 17 January 2010 the debate on the motions for a resolutions was removed from the schedule, thus avoiding a continental collision between the EU and the Strasbourg

Court, the long-term consequences of which would have been impossible to predict.

The German and Romanian “precedents”

The issue of the display of religious symbols in public educational institutions is familiar especially from the debate generated in the mid-1990s in Bavaria. In 1995, the German Federal Constitutional Court overturned a Bavarian regulation which mandated the installation of a cross in primary school classrooms. The plaintiff, an adept of Rudolf Steiner's anthroposophy movement, alleged his young daughter had been traumatized by the classroom display of an almost one-meter-tall “naked, dead man covered in blood”.²³ The school agreed to replace the crucifix with a smaller cross, but only in one classroom, while the plaintiff's children frequently changed classrooms in school. The Administrative Court of Bavaria refused to hear the plaintiff's complaint, which was sent before the Constitutional Court. In its ruling of 10 August 1995, the Court found that compulsory crucifixes in non-confessional schools represented a violation of the rights to freedom of faith, conscience, and religious or ideological creed enshrined in Article 4 of the German Basic Law – despite the fact that the Bavarian Constitution provided that children in public schools, which are regulated by the *Land* rather than the federal state, shall be educated on the basis of Christian values.

The crucifix decision was seen by many observers as marking a break with the jurisprudence of the Federal Constitutional Court in the preceding decades. Thus, the Court had previously upheld the compulsory public school systems in several states against accusations that they were too religious;²⁴ and had similarly upheld voluntary prayers in public schools against accusations that they were inherently coercive.²⁵ However, in the 1995 case the Federal Constitutional Court made reference to a 1973 precedent in which it had ordered the removal of a cross from a Düsseldorf courtroom where a Jewish lawyer was supposed to plead his case on behalf of a Jewish plaintiff. As in the precedent, in its 1995 ruling the Court acknowledged that the cross represented the shared Western values of tolerance and brotherly love, but observed that it also expressed “a definite religious conviction” and a sense of mission.²⁶ The court distinguished between the exercise of religious beliefs by government and private religious expression, especially in cases where pupils had to systematically put up with such beliefs (not the case in voluntary prayer).

It should be noted at this point that, despite the fact that formally the German Constitutional Court struck down a *Land* regulation *mandating* the presence of crucifixes in public school classrooms, its reasoning went beyond the specifics of the case. Thus, while formally “the suspension of the compulsory character of crucifixes on school walls does not mean interdiction”,²⁷ the Court’s arguments “support only the conclusion that all crosses in [public school] classrooms are unconstitutional.”²⁸ This, together with the widespread and inflamed incitements by high-ranking politicians and officials to disobeying the Constitutional Court’s decision, makes the Bavarian case quite relevant to the Romanian one, to which we now turn.

Three years ago Romania had a taste of its own “war over religious symbols” – in this case concerning religious icons. On 12 August 2006 philosophy teacher Emil Moise, whose daughter attended the Fine Arts High School in the city of Buzău, requested the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*, CNCD) to stop the act of discrimination allegedly constituted by the display of religious symbols in the aforementioned public school. Moise²⁹ claimed the displays in question discriminated against atheists, agnostics and persons belonging to minority faiths. He also referred to the symbols’ negative effect on the development of children’s personal and creative autonomy, particularly since Romanian Orthodox symbols also transmit “values of subservience”.³⁰

The Legal Resource Center (*Centrul de Resurse Juridice*) filed an *amicus curiae* with the CNCD in support of professor Moise. This document interpreted the display of religious symbols in schools as a violation of religious liberty and freedom of conscience. On 13 November 2006, several non-governmental organizations and other public intellectuals published an open letter in which they underlined the importance of the case for Romania’s democratization and noted that the coming hearings “concern a tremendously important issue with wide-ranging national implications.”³¹

In its decision of 26 November 2006 the College of Directors of the National Council for Combating Discrimination found with the plaintiff in his central claim that the display of religious symbols in public schools constituted a form of discrimination against agnostics and minority faiths, and ordered that such displays be present only during classes of religious education. The Council recommended that the Ministry of Education and Research adopt, within a reasonable time frame, regulations designed to

safeguard the proper exercise of children's right to learn under fair conditions, as well as the right of parents to educate their children in conformity with their religious and philosophical worldviews; and, further, to ensure the principle of state secularism and the autonomy of religious *culte* (acknowledged religious denominations) and of children's religious freedom. While the College of Directors avoided some of the more sensitive issues raised by Moise – such as the question of the “values of subservience” allegedly promoted in schools by some Orthodox practices–, its decision was thoughtful, carefully crafted, and of remarkable significance.

The decision was greeted with a fiery debate involving parliamentarians, two ministries (the Ministry of Education and Research and the Ministry of Culture and Religious Affairs), religious groups, secularist and fundamentalist NGO's, public intellectuals, and militant journalists. The Orthodox Patriarchate's press office released a communiqué in which it called any decision to remove religious symbols a “brutal, unjustified measure restricting religious freedom.”³² Alone among the *culte*, the Seventh Day Adventist Church saluted the CNCD decision, noting that the state and its institutions, public schools among them, should not be “involved in promoting and supporting the teachings and values of a particular religion or religious faith.” The Ministry of Education and Research and, respectively, two BOR-friendly non-governmental associations (the Civic Media and the Pro-Vita for the Born and the Unborn), appealed the National Council's decision in two separate cases.

After the lower-court decisions, on 11 June 2008 the High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*, ICCJ) declared the appeals admissible and overturned point 2 of the CNCD decision recommending that the Ministry of Education elaborate and enforce regulations concerning the display of religious symbols in public institutions. The Bucharest Court of Appeals, on the other hand, ruled in the second case that the National Council decision was legal and upheld it. As the latter ruling was not appealed, it is now binding and definitive. Consequently, there are, at the present time, two distinct court decisions in Romania concerning the display of religious icons in public schools – and they contradict each other. After the ICCJ decision, Moise complained to the European Court of Human Rights. Not long after this appeal, the ECtHR issued its *Lautsi* judgment.

General arguments against the *Lautsi* ruling: subsidiarity and the margin of appreciation

The European Parliament debate over a resolution condemning the ECtHR brought to the fore the question of subsidiarity, in particular this principle's power to legitimize state sovereignty with respect to an issue of outmost importance such as the display of religious symbols on the national territory. In a nutshell, the principle of subsidiarity claims that some matters should be handled by the states (or lower level authorities), as the latter are in a better position to assess them by comparison with inter-governmental bodies.

Within the EU, the application of the principle of subsidiarity is clearly defined in Protocol no. 30 on the application of the principles of subsidiarity and proportionality (1997).³³ According to this Protocol, the application of the principle of subsidiarity shall respect the general provisions and the objectives of the Treaty, particularly as regards the "maintaining in full of the *acquis communautaire* and the institutional balance"; and it shall not affect the principles developed by the Court of Justice regarding the relationship between domestic and Community law (paragraph 2). At the same time, under paragraph 3, the principle does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. Community action is justified if, firstly, the objectives of said action cannot be sufficiently achieved though action at the level of the Member States; and, secondly, if the objectives can be better achieved by Community action.

Under the provisions of Protocol no. 30, to what extent is the display of religious symbols in public institutions a matter of national sovereignty or, rather, of EU sovereignty? The answer hinges on the place of human rights in the Treaties of the European Communities and, further, on the relation between the internal order of the EU and the case law of the European Convention on Human Rights.

Given their paramount goal of economic integration, the three Founding Treaties, establishing three European Communities, did not address human rights, though the Treaty establishing the European Economic Community (EEC Treaty) set out a prohibition on discrimination based on nationality. The notion of human rights as a general principle of community law emerged with the European Court of Justice's decision in the *Stauder* case.³⁴ In this sense, "at the end of sixties and beginning of seventies, the ECJ recognized the existence of human rights as integral

part of Community law in the form of general principles of law which have a source in the constitutional tradition common to Member States and in international treaties on human rights.”³⁵

The 1986 Single European Act was the first Founding Treaty to explicitly include references to human rights, specifically to “the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.”³⁶ Article F of the Maastricht Treaty restated that the Union shall respect fundamental rights as safeguarded under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 13 of the Amsterdam Treaty authorized the Council to take appropriate action to combat discrimination based on, among others, religion or belief. Finally, the Treaty of Lisbon reformulated the EU Treaty human rights provisions:

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties... The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties...
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Subsidiarity, a fundamental principle of the European Communities on their founding, concerned mainly the issues of economic integration, and did not extend to the domain of human rights. Subsequently, as the principle of respect for human rights was included in the treaties of the European communities, the limitation on community laws was motivated

only by the superiority of national norms in the specific domain.³⁷ Today, the rights and freedoms set out in the Charter of Fundamental Rights of the European Union are recognized at the Union's level; in the future, they will enjoy direct applicability³⁸ – which is to say they are outside the domain of the principle of subsidiarity.

Some critics of the *Lautsi* decision also invoked, in defense of their position, the principle of judicial pluralism within the Council of Europe, specifically the so-called “margin of appreciation”. The latter states that “each society is entitled to [a] certain latitude in resolving the inherent conflict between individual rights and national interests or among different moral convictions.”³⁹ The margin of appreciation theory is, in turn, based on the notion that the values protected by the Council of Europe are diversity and pluralism, and these values also imply support for legal pluralism at European level.⁴⁰ The idea of the margin of appreciation is not defensive, a self-limitation of the European bodies with respect to the political issues at the core of sovereignty. There are now uniform standards concerning such matters as freedom of political speech and the protection of vulnerable groups.⁴¹ At the same time, there is a positive recognition of the capacity of states to determine the complex balance involved by various public interests. Being closer to the societies under their jurisdiction, a state's authorities are also better informed and may have a deeper understanding of the context of the cases tried by the ECtHR. For instance, with respect to the application of the ECHR limitation clause in the case of free speech, it is for the national authorities to make the initial assessment of the social need alleged to be so pressing as to limit the exercise of free expression.

This being said, it makes little sense to speak of a *violation* of the margin of appreciation principle in the *Lautsi* decision. The doctrine of the margin of appreciation means simply that in some cases the state is given complete freedom to interpret the European Convention on Human Rights, while in other cases it may not have the full freedom in question. As judge Tulkens, the only dissenting Grand Chamber judge in the 2005 *Sahin* case (see below), noted: “the issue raised in the application, whose significance to the right to freedom of religion guaranteed by the Convention is evident, is not merely a ‘local’ issue, but one of importance to all the member States. European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation.”⁴² Therefore the core of the matter is whether, with respect to the crucifix issue, the Italian state struck a better balance among the complex rights, liberties, and

public interests involved. But this is exactly the issue which the Court, often criticized for relying too much on the margin of appreciation in resolving religious display cases,⁴³ analyzed in its decision.

To conclude this section, neither the principle of legal pluralism, nor the principle of subsidiarity are in themselves able to determine the appropriateness of the ECtHR decision in the *Lautsi v. Italy* case. The question is not procedural, but substantive: are displays of religious symbols in public educational institutions compatible with the system of fundamental rights and freedoms?

Removing the symbols: freedom of thought, conscience, and religion, the right to education, and the best interest of the child

It is now appropriate to look deeper into the reasons for limiting religious manifestations in schools as suggested by the European Court's jurisprudence. Since the *Lautsi* decision is quite radical, in the sense that its logical outcome is the removal of virtually all religious symbols from schools in the Council of Europe member states, it is worthwhile to assess the ECtHR's progress in this direction thus far.

Within the ECHR system, the protection of children as subjects of the educational process is guaranteed on two levels. First, states must not indoctrinate children and educate them in ways contrary to the parents' "religious and philosophical convictions".⁴⁴ In practice, this means that schools may teach mandatory religious education classes only provided that they are substantively neutral, that is, restricted to teaching the history of religious groups and the substance of these groups' beliefs. The *Zengyn v. Turkey* case (2007) showed that the religious bias of textbooks does not pass muster in the context of mandatory religious education.⁴⁵ This principle became a crucial reference for the doctrine concerning freedom of thought, conscience and religion: international law and jurisprudence strictly limit governments' power to indoctrinate children religiously or ideologically by prohibiting compulsory religious education in public schools and permitting ethics education only if taught in a neutral manner.⁴⁶ Indeed, the case of *Folgerø et al. v. Norway* (2007) moved one step further. The Court noted that "participation in at least some" religious activities ("for example, prayers, psalms, the learning of religious texts by heart and the participation in plays of a religious nature") would "be capable of affecting pupils' minds in a manner giving rise to an issue under Article 2 of Protocol no. 1."⁴⁷

The second level of protection concerns the relationship between children and their parents – what, in the parlance of the Convention on the Rights of the Child, is called “the best interests of the child”.⁴⁸ In the case of *Kjeldsen et al. v. Denmark* (1976), concerning the wish of some parents to excuse their children from sexual education classes which were alleged to be contrary to their religious beliefs, the Court established, with the state, that the latter must enable pupils “to take care of themselves and show consideration for others in that respect”.⁴⁹ Students must not “land themselves or others in difficulties solely on account of lack of knowledge”. Furthermore, the substance of the sexual education curriculum demonstrated that it was not designed to inculcate a particular kind of ideology or to foster a specific type of sexual behavior.⁵⁰

In *Angelini v. Sweden* (1986), the European Commission on Human Rights similarly found with the state and against the mother whose atheist convictions determined her to ask the Swedish Ministry of Education that her child be excused from religious education classes.⁵¹ The exemption was refused, though in the context in which the school principal had already arranged for the daughter not to attend morning classes, which were religious in nature. The parent’s complaint, which alleged a violation of her daughter’s right not to be indoctrinated during such classes, was rejected by the Court as the daughter was exposed only to non-denominational classes, limited to offering information about religion.

A consistent reasoning has recently led to the exclusion of two female students which refused to remove their headscarves during physical education classes – the subject of *Dogru v. France* and *Kervanci v. France*, both decided in December 2008. Here, the Court acknowledged the right of the French state to limit the use of religious attire in public schools. The plaintiffs, both students at the time the acts subject to their complaints had occurred, were excluded from school as a consequence of their refusal to remove their headscarves in the circumstances noted above. They were offered the possibility to attend distance education classes. The Court found that the sanction, as well as the imposition of an appropriate attire during special classes, were compatible with the rights and liberties guaranteed under the European Convention. One important argument in the decision was the right of the state to ensure in educational institutions the conditions necessary for the achievement of those institutions’ objectives, “including the development and moulding of the character and mental powers of its pupils”.⁵²

One must distinguish at this point between limitations on using religious symbols in schools which are meant to ensure that children are provided, even against the wish of their parents, with the appropriate conditions for the development of their personalities and mental capacities; and cases in which the restrictions are meant to protect the other participants in the educational process. Thus, in *Dahlab v. Switzerland* (2001) the Court upheld the right of the Swiss state to prevent a civil servant from exercising her religion in ways which may have proselytising effects.⁵³ Similarly, in *Leyla Sahin v. Turkey* (2005) the ECtHR decided that banning headscarves at the University of Istanbul, although an interference with the right to manifest one's religion, did not violate Article 9 of the European Convention.⁵⁴ In its reasoning, the Court focused on the proportionality test (whether the interference was "necessary in a democratic society"), a point on which it granted the Turkish state a large margin of appreciation.⁵⁵

Finally, in *Lautsi v. Italy* the Court also referred to a "right of children to believe or not to believe" (and not just to the right of the parents to educate children in conformity with their religious views), as well as to the aim of public education to foster critical thinking in pupils. The ECHR jurisprudence has thus developed, in time, a system for the protection of the rights of children which extends beyond their right not to be indoctrinated by the state and the parents' right to educate their children in accordance with their religious and ideological *Weltanschauung*. The current interpretation of Article 2 of Protocol no. 1 to the ECHR emphasizes children's right to have access to educational values and practices which are in their best interests. When the Convention refers to parents' "convictions", it does not legitimize their arbitrary will, but those views which "have a certain force, weightiness, coherence and significance" and which "deserve the respect of a democratic society, which are not incompatible with the dignity of the person and, further, do not contradict the fundamental right to instruction – the first sentence of Article 2 thus dominating the entire text."⁵⁶

In light of the considerations above, we believe that the ECtHR could not but reason the way it did in the *Lautsi* case. This is so for two chief reasons. The first has to do with the tendency to assert the neutrality of the state in religious matters and especially in connection with headscarves worn in public schools. State neutrality has a positive dimension⁵⁷ as well, which is that of avoiding turning education into a religious space or a religious agent. Countries such as Germany,

Switzerland and France have introduced increasingly stricter rules with respect to religious manifestations in public schools. While this is by no means a general pattern – in the Netherlands, for example, equal treatment legislation is interpreted as permitting teachers and pupils in state schools to wear headscarves⁵⁸ –, recent developments seem to point in this direction. Such a trend, if a trend it be, cannot however be directed against selected religious minorities alone. While laws are general in their scope – the Swiss Law on Public Education prohibits “obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system” –, it seems evident that Muslims have been preponderantly affected by the “headscarf laws”.

As such, the Strasbourg Court had to respond to the claims of respected legal scholars to the effect that the ECtHR's decisions indicated that it had failed to move outside the prevalent religious paradigms in Europe and to be culturally sensitive towards non-Christian faiths.⁵⁹ A respected organization such as Human Rights Watch claimed that “laws banning teachers from wearing *hijab* in Germany discriminate against Muslim women who feel being targeted by laws that violate the very essence of their rights.”⁶⁰ Given the abundant anti-headscarf legislation in a country where Christian crosses are present in public schools, or religious garb is allowed in schools when worn by nuns, HRW seems to be correct in its assessment.

The ECtHR case law concerning religious displays seems dominated by the complaints of Muslims, in part because this religious community might also be the one which most obviously extends religious options outside the private sphere. Of the sixteen cases concerning religious displays tried before the *Lautsi* case, thirteen involved the headscarf, and three the Sikh turban; nine cases involved Turkey.⁶¹ This points to an evident imbalance. Due to its traditional, customary nature, the systematic presence of Catholic or Orthodox religious symbols in countries such as Ireland, Poland, Lithuania, Malta, Greece, Romania etc., was not contested despite the fact that it involves directly the state.⁶² Mrs. Lautsi's legal challenge simply put the spotlight on practices which are widespread in quite a few European democracies. Her case and others like it must be integrated somehow into the set of rules governing societies which herald equal treatment and non-discrimination among their basic values. The way to integration can only proceed through a secular educational environment.

The second reason for which the Court had to respond to the crucifix issue the way it did in *Lautsi* resides in its obligation to ensure the non-contradictoriness of ECHR jurisprudence. The Court has constantly reiterated the principle of state neutrality in religious matters. The latter must be construed in a general sense, which includes states' duty to ensure that schools remain neutral on questions of religion and ideology. The Court has found that religious freedom is incompatible with mandatory confessional education. But education consists not simply of the contents communicated during classes. It also involves the environment within which students learn and socialize. The Court has therefore recognized that religious symbols have an effect on pupils' sensibilities – and must now consider the impact of traditional symbols too. The ECtHR has several times referred to the role of the education system in instilling critical thinking in students. This immediately implies that this value as well must be balanced against freedom of religious manifestation. While it is doubtlessly true that the Strasbourg Court's decisions are very sensitive to factual circumstances, such that even a minor change in context may trigger different conclusions, it is no less true that, in looking at the whole picture, it is hard to see how the Court could legitimize the display of religious symbols in public educational institutions within the wider context of the values it has defined and upheld.

Conclusions

The previous analysis has focused on the substance of the issue at stake in *Lautsi v. Italy* and on arguments against and in favour of the decision of the Strasbourg Court. We believe it unlikely for the Grand Chamber to change the initial decision. This impression is shared by other experts working on the European Convention, though hardly by those militating for a constant presence of the churches at the forefront of public life.⁶³

As a matter of fact, the latter have frequently misread the ethical implications of the case. The intense debates which followed the Court's ruling have often been framed as an argument between secularists and those who wish to affirm their societies' religious traditions. This interpretation was clearly expressed by majority churches in Italy, Poland, Lithuania, Greece etc., as well as strengthened by organizations known for their support for religious minorities. One such example is the European Centre for Law and Justice (ECLJ), a respected non-profit Christian-

inspired NGO dedicated to the protection and defence of religious freedom. The ECLJ issued a memorandum criticizing the Court's approach, and the organization's director, Dr. Grégor Puppink, condemned attempts to impose "secularism throughout Europe", which he considered the very opposite of the values of pluralism, respect, and cultural diversity: "Real pluralism shall first apply within Europe and begin by respecting the various European societies in relation to culture, identity and religious traditions."⁶⁴ In May 2010 the ECLJ was accepted as an *amicus curiae* in *Lautsi v. Italy*.

The case of the European Centre is relevant because the organization is known especially for its courageous efforts to resist the arbitrary will of religious majorities. The *Economist* praised the NGO for denouncing the abuse of blasphemy laws in many Organisation of the Islamic Conference member states.⁶⁵ The ECLJ is known for representing the brother of a Pakistani Christian beaten to death because of his refusal to convert to Islam, or for protesting Egyptian oppression against Coptic Christians. In these cases and similar others the Centre reacted against the imposition of majority will.

Our point is not to single out the European Centre for its attitude in the case at hand, but to note that even organizations which routinely support the rights of religious minorities against the religiously-informed will of majorities tend to revert, in their reading of *Lautsi*, to arguments based on tradition, cultural diversity and sovereignty. Yet when religious freedom is involved tradition, cultural diversity, and sovereignty are frequently thinly disguised pretexts for the imposition of majority will. This is very much the case of the display of religious symbols in public schools, and the false pretence that the ECtHR decision "imposes secularism throughout Europe" is one way of conveniently ignoring the fact that the ruling's main upshot is to protect the rights of religious as well as non-religious persons. Likewise, the framing of the decision in terms of secularism versus freedom of religious manifestation expediently hides the patent truth that the ruling is as much about safeguarding the children's freedom not to have a religion as it is about securing the rights of children to make an informed choice with respect to their religion, a choice free of majority pressures. Religious freedom and freedom of conscience, rather than secularist ideology, are at the very core of the ruling.

One crucial question that arises at this point is whether the Court's decision does not also imply the removal of religious symbols from all

public institutions. The schools in *Lautsi v. Italy* are public institutions. In some of the decisions mentioned in this paper the ECtHR referred both to the specific nature of educational institutions, and to questions pertaining to the nature of the state more generally. The notion that the state should refrain from imposing beliefs in places where individuals are dependent on it is, to various extents, valid for all public institutions. European courts have occasionally struck down the practice of placing crucifixes in courthouses – a challenge the Helsinki Monitor has recently mounted in Greece⁶⁶ –, and the ECtHR upheld parliamentarians' right not to take oaths on the Scriptures.⁶⁷ The principle of denominational neutrality is relevant whenever citizens' presence on the premises of some state institution is compulsory irrespective of religion.

While a confirmation by the Grand Chamber of the ECtHR decision of 3 November 2009 will likely have no direct effect on the status of religious symbols in public institutions generally, it will nonetheless serve as a further argument in ensuring the religious neutrality of public spaces. The removal of religious symbols from public institutions would be a major step towards restricting, within the Council of Europe community, religious life to the private sphere – in other words, towards moving from a secular to a lay state.⁶⁸ The public response to *Lautsi* could be taken to suggest that, for the coming decades at least, such a development is impossible. But the connection between religious identity and common security could speed up the process. A lay public sphere is the only solution to ensuring genuine equality between members of majority and minority churches, agnostics, atheists, or non-theists. In the long term, this is the only way to eliminate religious (and anti-religious) tensions.

References

Andreescu, Gabriel. "Curtea de Apel București despre libertatea de religie." *Noua Revistă de Drepturile Omului* 4.2 (2008): 55-65.

Andreescu, Gabriel. "Prezența simbolurilor religioase în școlile publice: o bătălie pentru viitorul învățământului." *Noua Revistă de Drepturile Omului* 2.4 (2006): 38-57.

Benvenisti, Eyal. "Margin of Appreciation, Consensus and Universal Standards." *New York University Journal of International Law and Politics* 31 (1999): 843-854.

Bîrsan, Corneliu. *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol. I: Drepturi și libertăți*. București: C.H. Beck, 2005.

Bodnar, Adam. "We may be sued for the crosses: Polemic with Jerzy Stępień." Available online at <http://humanrightshouse.org/Articles/12998.html>.

Brabant, Malcolm. "Religious Symbols." *BBC News*, 13 November, 2009. Available online at http://news.bbc.co.uk/2/hi/video_and_audio/8423027.stm.

Caldwell, Peter C. "The Crucifix and German Constitutional Culture." *Cultural Anthropology* 11.2 (1996): 259-273.

Etinski, Rodoljub. "Retrospective and Prospective of Human Rights in the European Union." *Noua Revistă de Drepturile Omului* 4.3 (2008): 3-18.

Evans, Carolyn. "The 'Islamic scarf' in the European Court of Human Rights." *Melbourne Journal of International Law* 7 (2006): 52-73.

Hooper, John. "Human rights ruling against classroom crucifixes angers Italy." *The Guardian*, 3 November 2009.

Horváth, Gizela and Rozália Bakó. "Religious Icons in Romanian Schools: Text and Context." *Journal for the Study of Religions and Ideologies* 8.24 (2009): 189-206. www.jsri.ro

Human Rights Watch. "Germany: Headscarf Bans Violate Rights." 26 February 2009. Available online at <http://www.hrw.org/en/news/2009/02/26/germany-headscarf-bans-violate-rights>.

Joppke, Christian. "State neutrality and Islamic Headscarf Laws in France and Germany." *Theory and Society* 36.4 (2007): 313-342.

Kastanas, Elias. *Unité et diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*. Bruxelles: Bruylant, 1996.

Langenfeld, Christine and Sarah Mohsen. "Germany: The Teacher Headscarf Case." *International Journal of Constitutional Law* 3.1 (2005): 86-94.

Leskovar, Valerie. "Parental Rights and Religious Freedom in Education Considering the Case-law of the ECtHR." *International Constitutional Law Journal* 3.3 (1999): 232-239.

Nieuwenhuis, Aernout. "European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v. Turkey*, Decision of 29 June 2004, Application Number 44774/98", *European Constitutional Law Review* 1.3 (2005): 495-510.

Nowak, Manfred and Tanja Vospernik. "Permissible Restrictions on Freedom of Religion or Belief." In *Facilitating Freedom of Religion or Belief*, edited by Tore Lindholm, W. Cole Durham, Bahia G. Tahzib-Lie. Leiden: Martinus Nijhoff Publishers, 2004.

Rorive, Isabelle. "Religious Symbols in the Public Space: In Search of a European Answer." *Cardozo Law Review* 30.6 (2009): 2669-2698.

Tulkens, Françoise. "The European Convention on Human Rights and Church-State Relations." *Cardozo Law Review* 30.6 (2009): 2575-2591.

Van Bueren, Geraldine. *The International Law on the Rights of the Child*. The Hague: Martinus Nijhoff, 1998.

Wuerth, Ingrid Brunk. "Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech." *Vanderbilt Journal of Transnational Law* 31 (1998): 1127-1201.

Notes

¹ Isabelle Rorive, "Religious Symbols in the Public Space: In Search of a European Answer," *Cardozo Law Review* 30.6 (2009): 2697. The author also stresses that except for the 2005 *Sahin* case and two subsequent others (decided in December 2008), all 16 cases on religious displays focus on admissibility rather than the merits.

² See *Lautsi v. Italy* (Application no. 30814/06), available online at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=lautsi&sessionId=47526629&skin=hudoc-en>; see also Press release, *Lautsi v. Italy*, issued by the Registrar Chamber judgment, available online at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=36339028&skin=hudocen&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=77725&highlight=>.

³ Press release, *Lautsi v. Italy*.

⁴ Press release, *Lautsi v. Italy*.

⁵ *Lautsi v. Italy*.

⁶ Press release, *Lautsi v. Italy*.

⁷ Françoise Tulken, "The European Convention on Human Rights and Church-State Relations," *Cardozo Law Review* 30.6 (2009): 2679.

⁸ John Hooper, "Human rights ruling against classroom crucifixes angers Italy," *The Guardian*, 3 November 2009.

⁹ "Open letter by Massimo Albertin and Soile Lautsi," available online at <http://www.humanistfederation.eu/download/162-Lautsi%20Albertin%20statement.pdf>.

¹⁰ "Committee on Foreign Affairs Statement on the Judgment by the European Court of Human Rights on the Display of the Crucifix in Italian Classrooms," available online at http://www3.lrs.lt/pls/inter/w5_show?p_r=4028&p_k=2&p_d=94116.

¹¹ "Italy school crucifixes 'barred'," BBC News, available online at 3 November 2009, <http://news.bbc.co.uk/2/hi/8340411.stm>.

¹² "Italy unites to condemn crucifix ruling," *Radio France International*, available online at http://www.france24.com/en/en/node/4917686?quicktabs_1=0.

¹³ Malcolm Brabant, "Religious Symbols," BBC News, 13 November, 2009, available online at http://news.bbc.co.uk/2/hi/video_and_audio/8423027.stm.

¹⁴ "Russian Patriarch protests court ruling to ban cross from Italian schools," *Interfax*, 26 November 2009, available online at <http://www.interfax-religion.com/?act=news&div=6675>.

¹⁵ "Russian Patriarch protests court ruling to ban cross from Italian schools."

¹⁶ Article 11 of the Bylaws of the Pro-Vita Orthodox Organizations Federation sets out that the president of the Board of Directors shall always be a priest. Romanian Orthodox priests take an oath swearing allegiance to the Romanian Orthodox Church and its statute.

¹⁷ "Pro-vita București solicită CEDO rejudecarea cazului *Lautsi vs. Italia*," available online at <http://provitabucuresti.ro/Advocacy/cedo-italia-lautsi-crucifix-scoli.html>.

¹⁸ "Public letter on the *Lautsi v. Italy* case," available online at <http://www.humanistfederation.eu/download/277-Italian%20open%20letter.pdf>.

¹⁹ "Italian Secularists Support Lautsi Judgment: Open Letter to Council of Europe, Human Rights Court, Politicians etc.," available online at http://www.humanistfederation.eu/index.php?option=com_content&view=article&id=203.

²⁰ Center for Inquiry-London, Center for Inquiry- Netherlands and the Low Countries, Center for Inquiry-Bucharest, and Center for Inquiry-Poland.

²¹ For this quote and other motion quotes below, see the Motions for resolution available at

http://209.85.129.132/search?q=cache:yqkd_icr2TUJ:cm.greekhelsinki.gr/uploads/2010_files/ghm1252_enooume1_omades_ek_thriskeftika_symvola_english.doc+%E2%80%9Cthe+European+Court+of+Human+Rights+is+not+a+part+of+the+legal+system+of+the+EU%E2%80%9D+lautsi&cd=2&hl=en&ct=clnk.

²² "Motion for a Resolution," available online at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2009-0277+0+DOC+XML+V0//EN>.

²³ Peter C. Caldwell, "The Crucifix and German Constitutional Culture," *Cultural Anthropology* 11.2 (1996): 260.

²⁴ Being explicitly based on Christian norms, requiring the inclusion of Christian songs in music classes, designing curricula around Christian values etc.

²⁵ See Ingrid Brunk Wuerth, "Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech," *Vanderbilt Journal of Transnational Law* 31 (1998).

²⁶ Caldwell, "The Crucifix and German Constitutional Culture," 260.

²⁷ Gizela Horváth, Rozália Bakó, "Religious Icons in Romanian Schools: Text and Context," *Journal for the Study of Religions and Ideologies* 8.24 (2009): 195.

²⁸ Wuerth, "Private Religious Choice in German and American Constitutional Law," 1188.

²⁹ He has since become the leader of the association Solidarity for Freedom of Conscience.

³⁰ For a presentation of the case and especially the responses to it, see Horváth and Bakó, "Religious Icons in Romanian Schools."

³¹ Gabriel Andreescu, "Prezența simbolurilor religioase în școlile publice: o bătaie pentru viitorul învățământului," *Noua Revistă de Drepturile Omului* 2.4 (2006).

³² The communiqué was issued on 23 November 2006.

³³ Treaty Establishing the European Community.

³⁴ *Stauder v. City of Ulm* (Case 29/69), Judgment of 12 November 1969.

³⁵ Rodoljub Etinski, "Retrospective and Prospective of Human Rights in the European Union," *Noua Revistă de Drepturile Omului* 4.3 (2008): 7.

³⁶ O.J.L 169/1, 29. 6. 87.

³⁷ These national norms must be in compliance with the standards set by the European Convention. In fact, most EU countries have rendered the Convention a

part of domestic law. The paradox of statements invoking subsidiarity as an EU principle was that in a possible application of domestic legislation against Union law the ECHR would be the superior norm.

³⁸ After Protocol no. 14 to the European Convention of Human Rights enters into force, an additional agreement between the Union and State Parties to the ECHR will be necessary to regulate the procedures of EU accession to the ECHR. See Rodoljub Etinski, "Retrospective and Prospective of Human Rights in the European Union," 15.

³⁹ Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards," *New York University Journal of International Law and Politics* 31 (1999): 843-4.

⁴⁰ Elias Kastanas, *Unité et diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme* (Bruxelles: Bruylant, 1996), 21.

⁴¹ Elias Kastanas, *Unité et diversité*, 260.

⁴² Rorive, "Religious Symbols in the Public Space," 2682.

⁴³ Rorive, "Religious Symbols in the Public Space."

⁴⁴ Valerie Leskovar, "Parental Rights and Religious Freedom in Education Considering the Case-law of the ECtHR," *International Constitutional Law Journal* 3.3 (1999).

⁴⁵ Even though exemption procedures were envisaged, but involved "the heavy burden of [parents] disclosing their religious or philosophical convictions."

⁴⁶ Manfred Nowak and Tanja Vospernik, "Permissible Restrictions on Freedom of Religion or Belief," in *Facilitating Freedom of Religion or Belief*, eds. Tore Lindholm, W. Cole Durham, Bahia G. Tahzib-Lie, 171 (Leiden: Martinus Nijhoff, 2004).

⁴⁷ *Folgerø v. Norway* (Application no. 15472), 29 June 2007. See also *Lautsi v. Italy*: "Negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice."

⁴⁸ *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

⁴⁹ *Kjeldsen v. Denmark* (Application no. 5095/71).

⁵⁰ On the *Kjeldsen* and *Angelini* (see below) cases in relation to non-indoctrination – Geraldine Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff, 1998), 160-2.

⁵¹ *Angelini v. Sweden* (Application no. 10491/83).

⁵² *Dogru v. France* (Application no. 31645/04).

⁵³ Mrs. Dahlab was appointed primary-school teacher by the Geneva government, after which abandoned the Catholic faith and converted to Islam. The Director General prohibited the applicant from wearing an Islamic headscarf in the performance of professional duties.

⁵⁴ Aernout Nieuwenhuis, "European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v. Turkey*, Decision of 29 June 2004, Application Number 44774/98", *European Constitutional Law Review* 1.3 (2005).

⁵⁵ Rorive, "Religious Symbols in the Public Space," 2681. In Germany, the Federal Constitutional Court decision of 2003 to the effect that a ban on headscarves for teachers needs a basis in an act of a *Land* legislature implies the possibility of such a ban. Bans are effective in nine German states. (See Christine Langenfeld and Sarah Mohsen, "Germany: The Teacher Headscarf Case," *International Journal of Constitutional Law* 3.1 (2005).) As is by now well known, in 2005 France adopted the so-called "Law on *Laïcité*" which prohibits wearing in public schools any conspicuous religious symbols or dress (headscarves, turbans, large crucifixes, Jewish kippot etc.).

⁵⁶ Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol. I: Drepturi și libertăți* (București: C.H. Beck, 2005), 1071.

⁵⁷ On the various conceptions in Europe of state neutrality with respect to religion, see Christian Joppke, "State neutrality and Islamic Headscarf Laws in France and Germany," *Theory and Society* 36.4 (2007).

⁵⁸ Aernout Nieuwenhuis, "European Court of Human Rights: State and Religion, Schools and Scarves."

⁵⁹ Carolyn Evans, "The 'Islamic scarf' in the European Court of Human Rights," *Melbourne Journal of International Law* 7 (2006). Carolyn Evans accuses the Court of employing stereotypes which undermine the notion of human rights.

⁶⁰ Human Rights Watch, "Germany: Headscarf Bans Violate Rights," 26 February 2009, available online at <http://www.hrw.org/en/news/2009/02/26/germany-headscarf-bans-violate-rights>.

⁶¹ Rorive, "Religious Symbols in the Public Space," 2677.

⁶² In 2004 the ECtHR declared inadmissible a complaint about an alleged violation constituted by the presence of crucifixes in the Polish classrooms, but the inadmissibility was on procedural grounds (*Bulski v. Poland*, Application no. 46254/99).

⁶³ "In my opinion", writes Adam Bodnar, "the Grand Chamber will not deal with the *Lautsi v. Italy* case, especially that it is difficult to imagine a different resolution, considering the Convention." See Adam Bodnar, "We may be sued for the crosses: Polemic with Jerzy Stępień", available online at <http://humanrightshouse.org/Articles/12998.html>.

⁶⁴ See <http://www.eclj.org/Releases/Read.aspx?GUID=131080c4-c4e3-4b10-ae59-befa797e0377&s=eur>.

⁶⁵ *The Economist*, "The Limits of Freedom and Faith", 31 March, 2010.

⁶⁶ Malcolm Brabant, "Religious Symbols."

⁶⁷ Corneliu Bîrsan, *Convenția europeană a drepturilor omului*, 721.

⁶⁸ For the distinction between a secular and a lay state, see Gabriel Andreescu, "Curtea de Apel București despre libertatea de religie," *Noua Revistă de Drepturile Omului* 4.2 (2008).