Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?

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Abstract

This article has two central objectives. First, to critique the proper place of religion in the public square of modern European secular societies. Secondly, to critique the proper role of the European Court of Human Rights in relation to freedom of religion. This article addresses ongoing conflicts as to the proper place of religion in European societies. Hitherto those conflicts have largely been the concern of sociologists and theologians. However, there is an increasing jurisprudence at both domestic and European levels that implicates both freedom of religion and the use of religious arguments in the public square. Within the context of that developing jurisprudence I contextualise and explore the judgments of the Chamber and Grand Chamber of the European Court of Human Rights in Lautsi v Italy—a challenge to the obligatory presence of crucifixes in state schools in Italy. It is submitted that the Grand Chamber's judgment was of seminal importance as it dealt with major systemic issues. These included the application of the margin of appreciation, the scope for perpetuating national traditions, religious symbolism in the public square, the relationship between secularism and neutrality, and whether perpetuating majority religious traditions necessarily discriminated against newer minority religions.

Keywords: religion in the public square – freedom of religion – secularism – margin of appreciation – discrimination – crucifixes

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in classrooms – Article 9 European Convention on Human Rights – Article 2 of Protocol 1 – Lautsi v Italy

1. Introduction

While some papal speeches need careful decoding,1 this was not the case for those delivered by His Holiness Pope Benedict XVI2 during his official state visit to the United Kingdom (UK) in 2010.3 In particular, he clearly and directly addressed what he described as ‘aggressive secularism’ and the proper place of religious belief within the democratic political process in the UK. These issues are considered in Section 2 below. Given his authoritative position as Head of the Catholic Church (in 2009 there were an estimated 1.18 billion Catholics in the World) the Pope’s comments have a universal political and legal resonance. The comments were made in the context of ongoing conflicts as to the proper place of religion in European societies. Hitherto those conflicts have largely been the concern of sociologists and theologians. However, there is an increasing jurisprudence at both domestic and European levels that has implicated both freedom of religion generally and the use of religious arguments in the public square in particular. The Pope’s visit to the UK coincided with the Grand Chamber of the European Court of Human Rights (the ECtHR) having to consider what has been perceived by some as an example of ‘aggressive secularism’, namely a human rights challenge to the presence of crucifixes on the walls of Italian classrooms in Lautsi v Italy, as detailed in Sections 3–5 below. Section 4 assesses the unusually strong and coordinated legal and political campaign, supported by the Vatican, to secure the reversal of the decision of a Chamber of the European Court in Lautsi in 2009, which had found that the presence of the crucifixes violated the European Convention on Human Rights (ECHR). These culminated in a Judgment of the Grand Chamber (GC) in Lautsi v Italy in 2011, which overruled that decision. That seminal judgment dealt with a number of major systemic issues—the application of the margin of appreciation, the scope for perpetuating national traditions, religious symbolism in the public square, the relationship between secularism and neutrality and whether perpetuating majority religious traditions necessarily discriminated against newer minority religions. Section 5 critiques the GC’s judgment from a variety of perspectives. The Concluding Comments in

2 Joseph Alois Ratzinger was elected Pope in 2005. He has been Professor of Theology at various German universities and he formally remains a Professor at the University of Regensburg. See Ratzinger and Pera, Without Roots: The West, Relativism, Christianity, Islam (New York: Basic Books, 2006).
3 For the text of all of the speeches see: http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/index.en.htm [last accessed 1 July 2011].
Section 6 addresses the place of religion in the ECHR and the proper role of the European Court of Human Rights on religious issues. Overall, the article has two central objectives. First, to critique the proper place of religion in the public square of modern European secular societies. Secondly, to critique the proper role of the European Court of Human Rights in relation to freedom of religion.

2. The Place of Religion in the Political Process

A. Secularism and State Identity

The 47 states parties to the ECHR cover a range of complex national and sub-national identities. Their national Constitutions (whether written or unwritten) perform an important symbolic role in defining or asserting their identities. So too can religious symbols, whether worn or displayed. However, modern European states all profess a predominantly secular identity. Yet how they interpret and apply secularism, and the idea of ‘religious neutrality’ that commonly goes with it, can vary significantly. While their
legal norms may not derive from a religious basis, adjudication according to religious norms is not uncommon.11 As a constitutional concept secularism is thus ‘fragile and malleable’12 because different secular constitutional states can have very different attitudes towards religion.13

At one end of the spectrum is a secular view of a lay public sphere as the only solution to ensuring genuine equality between members of majority and minority churches, agnostics, atheists or non-theists and eliminating religious and anti-religious tensions.14 France and Turkey are close to that end of the spectrum. Their approach can be described as militant secularism or, less pejoratively, as fundamentalist secularism. Religion is perceived as a threat to secularism and so must be kept at a distance from the state.15 One of the consequences of French secularism is that religion is seen as a private matter. The French perspective is that secularism can serve religious freedom and secure religious harmony.16 In France, although the principle of secularism (laïcité) is uncontested, its content is not. There is much pragmatic accommodation of religion by the state in terms of holidays, prayers, food regulations, support for private religious schools and indirect financial support for religions. The French view is that it is the neutrality of the public arena which permits the various religions to coexist harmoniously. Turkey similarly argues that its secularist principle is essential to the preservation of human rights and...
democracy. The ECtHR has viewed Turkish and French secularism in a positive light. In *Leyla Şahin v Turkey* the GC explained that the principle of secularism, as elucidated by Turkey’s Constitutional Court, was undoubtedly one of the fundamental principles of the State, which are ‘in harmony with the rule of law and respect for human rights’. Upholding that system could be necessary to protect the democratic system in Turkey. In *Dogru v France* it was considered legitimate in the light of the values underpinning the ECHR for religious freedom to be recognized and restricted by the requirements of secularism.

In contrast with France and Turkey, many parties to the ECHR, including Italy, are also secular but have a much more open, positive and accommodating approach to religion. At the other end of the spectrum are states with established churches such as Denmark, Greece and the UK. Such arrangements existed when the ECHR was drafted and when they became parties to it. Thus, there are a variety of models of secularism and church–state relations within the members of the Council of Europe. The models are complex to categorize and actual practice may only represent a rough approximation. The ECtHR has accepted that a variety of church–state relationships can still comply with ECHR standards, particularly those in Article 9 (freedom of thought, conscience and religion) and Article 2 of Protocol 1 (P1) (respect for the right of parents to ensure that their children’s education and teaching is in conformity with their own religious and philosophical

17 2005-XI; 44 EHRR 99.
18 Ibid. at para 114 citing *Refah Partisi v Turkey* 2003-II; 37 EHRR 1 at para 93.
19 49 EHRR 179 at para 72.
20 See Modood and Kastoryano, ‘Secularism and the Accommodation of Muslims in Europe’, in Modood et al. (eds), *Multiculturalism, Muslims and Citizenship - A European Approach* (London: Taylor and Francis, 2005) 162; and Zucca, infra n 58. See *Chamberlain v Surrey School District No 36* [2002] 4 S.C.R. 710 (Canada) (‘secular’ should not be understood as ‘non-religious’ or excluding religion. Rather, the law’s position should allow for expression of both religious and non-religious convictions in the public sphere).
22 States considered that they did not have to make reservations to these provisions to reflect particular church-state relations. The European Union (EU) appears to accept the compatibility of established or state churches with EU law, including fundamental rights: see Doe, ‘Towards a “Common Law” on Religion in the European Union’ (2009) 37 *Religion, State and Society* 147; and McCrea, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010). A proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief etc specifies that the directive would not cover national laws relating to the secular nature of the state and its institutions: see Committee of Ministers (2008) 426 final, 2 July 2008.
23 See Rosenfeld, supra n 12 at 2349–51.
convictions). Of course, since the entry into force of the ECHR most states have become home to a greater multiplicity of religions with their own history and traditions. Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the ECtHR has given special importance to the role of the national decision-making body. This has notably been the case when it came to regulating the wearing of religious symbols in educational institutions, in respect of which the approaches taken in Europe were diverse. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. However, it has been suggested that some recent cases attest a stricter attitude on the part of the ECtHR in respect to official or dominant church systems.

B. Secularism and Neutrality

A number of states across the secularism spectrum apply a governing principle of state ‘neutrality’ in the religious sphere—for example, Germany, Switzerland, and, outside of Europe, the United States. The principle can either be an express provision of a State Constitution or be one of the principles derived from it, such as religious non-discrimination. The state is expected to be ‘neutral’ as between religions and treat them in a non-discriminatory manner. However, in practice this can be very difficult. The political, legal and social culture of the majority may be imbued with religion and in Europe this will normally be the Christian religion.

States have to determine the proper place and function of religion in the state as part of their national identity. There can be positive secularism


27 See Tulkens, supra n 25 at 2584–5, citing Folgero and others v Norway 46 EHRR 1147, and Alexandridis v Greece Application No 19516/06, Merits, 21 February 2008 (that applicant was forced to reveal to a court that he was not an Orthodox Christian, which interfered with his freedom not to have to manifest his religious beliefs in violation of Article 9).

28 See McGoldrick, supra n 8 at Chapters 3, 4 and 8 para 8.2.

29 See Rosenfeld, supra n 12 at 2353.


where the state is regularly involved with accommodating religions but emphasises its neutrality as between them. Or there can be a more negative form of secularism whereby religion is protected from government establishment and state interference. Both approaches can lead to a highly refined jurisprudence on what the state can and cannot do to accommodate religion whilst remaining ‘neutral’.33 Underlying neutrality jurisprudence are fundamental debates as to the role of freedom of religion in a democracy and why religion should be tolerated or respected,34 whether religious freedom contributes to public order (ordre public),35 and narrower debates on conflicts between generally applicable norms and religious norms.36

However, secularism can itself be presented as a particular world-view and so a state’s adoption or advocacy of it may seem to contradict the principle of neutrality.37 The principle of state neutrality, as part of a doctrine of toleration, has been attacked by communitarians as being implausible, unrealistic, utopian, founded on a particular liberal theory and fundamentally insensitive to difference.38 The assumption that neutrality can mean equality, even in


37 An analogy can be made with the argument that liberalism is illiberal in that it only accepts a philosophy of liberalism.

theory, has been questioned by critics of liberalism and of liberal education. Thus, it has been argued that ‘if neutrality can never translate to equality, then the public square as a space equally open and accessible to all citizens is also a theoretical (as well as practical) impossibility’.39

C. ‘Aggressive Secularism’ in the UK

In a speech to state authorities at the Palace of Holyroodhouse, Edinburgh, the Pope pointed to the deep Christian roots that were still present in every layer of British life. He recalled that ‘the Christian message has been an integral part of the language, thought and culture of the peoples of these islands for more than a thousand years’. However, he warned about the ‘more aggressive forms of secularism’ that no longer valued or even tolerated the UK’s traditional values and cultural expressions. He urged the nation not to lose those values as it strove to be ‘a modern and multicultural society’.40 The Pope’s comments on secularism had twice been presaged before the visit to the UK. In 2008, the leader of Britain’s Catholics, Cardinal Murphy O’Connor, criticized representatives of an ‘aggressive secularism’ that he believed was gaining ground in the UK. He defended the Catholic Church’s intervention in a debate over ‘hybrid’ embryos, and argued that Christian leaders should hold a privileged position over the representatives of other faiths when it came to their input into public policy.41 He claimed that ‘Judaeo-Christian values’ were the only thing binding British society together.42 Just before the Pope’s visit to the UK an influential German news magazine, Focus, carried an interview with one of his senior diplomatic advisers, Cardinal Kasper.43 He stated that ‘an aggressive new atheism has spread through Britain’.44 He cited the Eweida v British


40 In another speech he stated that obedience to the word of God ‘must be free of intellectual conformism or facile accommodation to the spirit of the age’, Ecumenical Celebration, Westminster Abbey, supra n 3.


42 See Murphy-O’Connor, ‘Faith in Britain: a personal perspective’, in Murphy-O’Connor et al. (eds), Faith and Life in Britain (London: St Pauls, 2008).

43 See http://www.focus.de/ [last accessed 7 July 2011].

case as an example of a person being discriminated against for wearing a cross while at work. Britain today, he said, is ‘a secularised [translation corrected] and pluralist country. Sometimes, when you land at Heathrow, you think you have entered a third world country.’

D. The Proper Place of Religion in the European Political Process

As for the proper place of religious belief within the democratic political process,46 the Pope made a plea for the voice and place of religion in the public square:

[W]here is the ethical foundation for political choices to be found? The Catholic tradition maintains that the objective norms governing right action are accessible to reason, prescinding from the content of revelation.47

According to this understanding, the role of religion in political debate was not so much to supply these norms but rather to help purify and shed light upon the application of reason to the discovery of objective moral principles.48 For the Pope, distorted forms of religion, such as sectarianism and fundamentalism, arose when insufficient attention was given to the purifying and structuring role of reason within religion. He suggested that the world of reason and the world of faith—the world of secular rationality and the world of religious belief—needed one another and should not be afraid to enter into a profound and ongoing dialogue, for the good of our civilisation. Religion was not a problem for legislators to solve but a vital contributor to the national conversation. He voiced concern at the increasing marginalisation of religion, particularly of Christianity, that was taking place in some quarters, even in nations, which placed a great emphasis on tolerance. There were those who argued, (paradoxically) with the intention of eliminating discrimination, that Christians in public roles should be required at times to act against their

45 [2010] EWCA Civ 80, [2010] I.C.R. 890. The Eweida case set a very high test for establishing disadvantage. Eweida lost her case but British Airways changed their policy in response to political and public criticism. In 2011, applications to the ECHR were brought against the UK in the cases of Eweida, Chaplin, Ladele, infra n 49, and McFarlane, infra n 50: see Application Nos 48420/10, 59842/10, 48420/10 and 59842/10, respectively. For successful challenges based on non-Christian/cultural beliefs, see R (Watkins-Singh) v Aberdare High School [2008] EWHC (Admin), [2008] ELR 561 (prohibition on Sikh girl wearing Kara bracelet was indirect religious and racial discrimination); and G v Head Teacher and Governors of St Gregory’s Catholic Science College [2011] EWHC 1452 (Admin) (uniform policy prohibiting boys having hair in ‘cornrows’ was indirect racial discrimination).


47 ‘Address at Westminster Hall with representatives of British Society’, supra n 3. He described the British Parliament’s legislation on the abolition of the slave trade as being ‘built upon firm ethical principles, rooted in the natural law’.

48 On the role of reason within religion, see Lipshaw, ‘Can There Be a Religion of Reasons?’ (2010/11) 26 Journal of Law and Religion 43.
These were worrying signs of a failure to appreciate not only the rights of believers to freedom of conscience and freedom of religion, but also the 'legitimate role of religion in the public square.' The way forward was to promote and encourage dialogue between faith and reason at every level of national life. More specifically, religious bodies, including institutions linked to the Catholic Church, needed to be free to act in accordance with their own principles and specific convictions based upon the faith and the official teaching of the Church. In this way, such basic rights as religious freedom, freedom of conscience and freedom of association would be guaranteed.

The Pope's comments on the place of religious belief in the political process were read as implicitly criticising Catholic politicians who occupied public office and who acted against their conscience, for example, by supporting legal abortion. They could also be read as a response to major popular...
scientific works, which have treated religious belief as delusional and unscientific.\textsuperscript{55} His wider plea for the proper place of the church in public debate was supported by the Archbishop of Canterbury.\textsuperscript{56} Finally, in an address to religious leaders at St Mary's University College the Pope argued the Catholic Church had placed special emphasis on the importance of dialogue and cooperation with the followers of other religions.\textsuperscript{57} This included exploring together how to ensure the non-exclusion of the religious dimension of individuals and communities in the life of society.

While no credible account of European history and power could ignore its religious dimension, it has been suggested that the essential tenets that animated the Enlightenment project were threefold: the radical separation between the realm of Faith and that of Reason; entrusting the ruling of the public sphere exclusively to the dictates of the realm of Reason (that is, reasons accessible to all individuals);\textsuperscript{58} and the promotion of liberty and equality for all.\textsuperscript{59} While the tenets are, in some senses, idealistic and theoretical,\textsuperscript{60} the Pope's views challenged each of them. If faith has a role to play in public debate on the determination of 'reason' then this mixes the realms of faith and reason again, and this takes faith back into the 'public square'. The growth of the powers and functions of modern states has brought an expanded public square into greater focus, particularly when allied to the normative growth of the principles of equality and the expanding list of categories of


\textsuperscript{57} See supra n 3. See also Gonzalez et al., 'Beyond the Conflict: Religion in the Public Sphere and Deliberative Democracy' (2009) 15 \textit{Res Publica} 251, who argue that what is required is: (i) the generation and maintenance of public spaces in which there could be discussion and dialogue about particular cases; and (ii) evaluation of whether the basic conditions of moral discourse are present in these spaces. Thus deliberation becomes a touchstone for the building of a shared democratic ethos.


\textsuperscript{59} Rosenfeld, supra n 12 at 2333. Liberal theory regards the public space as the realm of reason.

\textsuperscript{60} In national constitutional theory and practice the inter-relationship between faith and reason tends to be one of continual contestation and evolution.
non-discrimination. The dramatic increase in what is now regarded as the ‘public square’ and ‘public life’ means that the religion-public square debate has to be continually re-examined.\(^\text{61}\) If the religion-public square debate was conceived of as a zero-sum game then the expectation was that religion would rapidly disappear into privatisation.\(^\text{62}\) However, the social reality in Europe appears to be one of a ‘de-privatisation of religion’, as religion (in both its institutional and practical—increased religiosity—forms) has assumed a growing salience in the politics of countries in Europe. Indeed, throughout the world there has been a re-politicisation of religion.\(^\text{63}\) Religions continue to have important roles in responding to social and economic problems and can be critical actors in the voluntary sector.\(^\text{64}\)

If religion, and religions, have a ‘legitimate role’ in the public square, and can be perceived as a ‘public good’, then their understanding of freedom of conscience and freedom of religion may give rise to different outcomes in terms of the promotion of fundamental human rights to liberty, equality and non-discrimination.\(^\text{65}\) The relationship between human rights and religion is a deeply contested one.\(^\text{66}\) The possibility of conflict between human rights principles and religions or philosophies has resided at the heart of human rights theory from the beginning.\(^\text{67}\) A proposal to include a reference to ‘God’ was made during the drafting of the Universal Declaration of Human Rights

\(^{61}\) See Chaplin, Talking God – The Legitimacy of Religious Public Reasoning (Buckingham: Theos, 2008), available at: http://campaigndirector.moodia.com/Client/Theos/Files/TalkingGod1.pdf [last accessed 11 July 2011]; Biggar and Hogan (eds), Religious Voices in Public Places (Oxford: Oxford University Press, 2009), in which a number of the contributors contest the Rawlsian notion of public reason (see supra n 58) and argue for systematic engagement with different and opposing comprehensive doctrines, including religious ones. See also Macklem, ‘Faith as a Secular Value’ (2000) 45 McGill Law Journal 1 (submitting that there are secular reasons for regarding faith as valuable).


\(^{64}\) See Faith and Policy - Where Next for Religion in the Public Sphere? 1 July 2010, available at: http://www.religionandsociety.org.uk [last accessed 11 July 2011]. For example, Ladele, supra n 49, might not have lost her case as her freedom of religion would have been given equal weight to those who claimed that her views were discriminatory on the basis of sexual orientation. An accommodation between the two positions was practically possible in that case because that was what had actually been happening before she was dismissed. Such an outcome is precisely what secularists would argue against. For an excellent analysis of the concept of reasonable accommodation in a number of jurisdictions, see Bribosia et al., ‘Reasonable Accommodation for Religious Minorities - A Promising Concept for European Antidiscrimination Law?’ (2010) 17 Maastricht Journal of European and Comparative Law 137.

\(^{65}\) See Ghanea et al. (eds), Does God Believe in Human Rights? Essays on Religion and Human Rights (Leiden: Nijhoff, 2007); and Hunter-Henin. infra n 73.

1948, but rejected because it was not universally acceptable. While a divinely inspired natural rights and natural law may have provided part of the philosophical framework, the modern concept of human rights has increasingly become secularized. Modern international and European human rights instruments contain no references to any religious derivation or philosophical basis, though some consider the idea of human rights as ‘unavoidably religious’.

3. ‘No Crucifixes in the Classroom’—Aggressive Secularism in the European Court of Human Rights?

What the Pope might have perceived as a contemporary example of ‘aggressive secularism’ was the judgment of the Chamber of the ECtHR in Lautsi v Italy in November 2009. The Court had addressed religious clothing in education and compulsory religious education before, but this was the first occasion on which it had addressed the issue of physical religious symbols—crucifixes—in state schools. Concern had previously been expressed that the ECtHR’s jurisprudence on Article 9 had turned it into a ‘tool for the repression of religious liberty rather than a means of upholding it’ and that the Court had not developed the necessary robust intellectual approach to the principles of pluralism and neutrality to assist it to fairly and appropriately balance out important competing interests. The Chamber’s Judgment finding violations of Article 9 of the ECHR and Article 2 of P1 was described as a ‘major victory

72 50 EHRR 42. See Panara, ‘Lautsi v Italy: The Display of Religious Symbols by the State’ (2011) 17 European Public Law 139.
73 The presence of crucifixes in the Polish classrooms was raised as an issue in Bulski v Poland Application Nos 46254/99 and 31888/02, Admissibility, 30 November 2004, but was not referred to in the decision on partial inadmissibility. See generally Hunter-Henin, ‘Religious Freedoms in European Schools: Contrasts and Convergence’, in Hunter-Henin (ed), Law, Religious Freedoms and Education in Europe (Farnham, Ashgate, forthcoming 2011).
74 See Evans and Petkoff, supra n 33 at 208.
75 See Evans, supra n 34 at 340.
for the global secularist movement.\textsuperscript{76} It attracted a very critical reaction from the Vatican.\textsuperscript{77} The case has been described as ‘emblematic’ because it called into question the visible presence of Christ in schools of Italy and of the whole of Europe, and ‘symbolic’ of the ‘present conflict on the future of the cultural and religious identity of Europe’.\textsuperscript{78} The conflict confronted the promoters of the total secularization of society and those who defend the religious identity of Europe.\textsuperscript{79}

\textbf{A. The Lautsi Case}

Ms Soile Lautsi, is an Italian national who lives in Abano Terme, in the strongly Catholic region of Veneto in Northern Italy.\textsuperscript{80} In 2001–2002 her children, Dataico and Sami Albertin, aged 11 and 13 years, respectively, attended the State school Istituto comprensivo statale Vittorino da Feltre in Abano Terme. All of the classrooms had a crucifix on the wall, including those in which her children had lessons. The obligation to display crucifixes in classrooms dates back to a Royal Decree in 1860, that is, before the unification of Italy. The obligations were restated in Ministry of Education Circulars in 1922 and 1926 and in Royal Decrees of 1924 and 1928, adopted when Italy was a fascist state. The Italian courts have held that these latter Decrees are still in force. The Lateran Pact (1929) between the Holy See and Italy confirmed Roman Catholicism as Italy’s only official religion.\textsuperscript{81} In 1948, a republican Constitution was adopted. The Catholic Church is the only church named in the Constitution (Article 7). Secularism (\textit{laicità} in Italian) is not explicitly enshrined in the Constitution but the Italian Constitutional Court has declared that secularism is to be regarded as one of the fundamental principles of the Italian legal system and that the principle defined the State as a pluralist entity.\textsuperscript{82} However, secularism


\textsuperscript{77} See infra n 118. Since 1970 the Holy See has had observer status at the Council of Europe. It is a party to a significant number of treaties but they do not include the ECHR. See \textit{Pellegrini v Italy} Application No 30882/96, Merits, 31 October 2007 (violation of Article 6 ECHR where Italian courts had failed to ensure that the applicant had had a fair hearing in the ecclesiastical proceedings before a Vatican court before issuing the authority to enforce the judgment of the Tribunal of the Roman Rota).

\textsuperscript{78} Puppinck and Wenberg, supra n 114 \textit{laicité}.


\textsuperscript{80} She is Finnish-born and a member of the Italian Union of Atheists, Agnostics and Rationalists. She has specifically not stated whether she is an atheist or not.

\textsuperscript{81} See \textit{http://www.aloha.net/} \textit{mikesch/treaty.htm} [last accessed 11 July 2011].

\textsuperscript{82} See \textit{Corte Costituzionale}, available at: \textit{http://www.cortecostituzionale.it/} [last accessed 11 July 2011]; and \textit{Lautsi} (Chamber), supra n 72 at para 24. This was based on the combined interpretation of a number of constitutional provisions. It was only in 2001, after a number of rulings on secularism, that the Italian Constitutional Court itself removed crucifixes from its
in Italy does not imply neutrality, but rather a positive or welcoming attitude towards all religions and religious communities. In 1985 an amendment to the Lateran Pact was ratified. Its effect was that the principle that Catholicism was the only official religion was considered to be no longer in force. There has been a significant decline in church attendance in Italy but the Church remains of social, cultural, political and moral significance.

Since the revision of the 1929 Lateran Pact, the issue of displaying the crucifix in public buildings such as schools, hospitals and law-courts has been controversial and the subject of much debate. In 2000, the Court of Cassation ruled as illegitimate the presence of the crucifix in polling stations. In 2007, a directive recommending that school principals display crucifixes was sent to all schools by the Ministry of State Education. In practice, local bodies decide whether they want crosses in schools and courthouses, and the majority of them do. In February 2009, a teacher was suspended for a month because she removed a crucifix from a public school classroom in the state of Perugia.

Some Italian schools have dropped Nativity plays and Easter plays so as not to offend Muslim pupils and other religions.

Lautsi considered that the display of crucifixes was contrary to the principle of secularism by which she wished to bring up her children. She informed the school of her position. She referred to the Court of Cassation judgment on polling stations. In April 2002, Lautsi’s husband raised the issue of religious symbols with the school’s governors. In May 2002, the school’s governing body, after a secret ballot, decided to leave the crucifixes in the classrooms.

In July 2002, Lautsi complained to the Veneto Regional Administrative Court about the decision by the school’s governing body, on the ground that it infringed a number of constitutional principles of secularism and of impartiality on the part of the public authorities. The Ministry of State Education, which joined the proceedings as a party, emphasised that the impugned situation was provided for by the Royal Decrees of 1924 and 1928.
2004 the Administrative Court granted her request that the case be submitted to the Constitutional Court for an examination of the constitutionality of the presence of a crucifix in classrooms. Before the Constitutional Court, the Government argued that such a display was natural, as the crucifix was not only a religious symbol but also the 'banner' of the Catholic Church, the only Church named in the Italian Constitution of 1948. As such it was a symbol of the Italian State. In December 2004, the Constitutional Court held that it did not have jurisdiction to rule on the merits of the issue because the disputed provisions were administrative regulations, whereas it could only rule on provisions having the status of law. The proceedings before the Administrative Court were resumed. In March 2005, that court dismissed Lautsi's complaint. It held that the crucifix was both the symbol of Italian history and culture, and consequently of Italian identity, and the symbol of the principles of equality, liberty and tolerance, as well as of the state's secularism. She appealed to the Consiglio di Stato (Council of State). In February 2006, it dismissed her appeal, on the ground that the cross had become one of the secular values of the Italian Constitution and represented the values of civil life.

Before the European Court, Lautsi alleged, in her own name and on behalf of her children, that the display of the crucifix in the State school attended by the latter was contrary to her human right to ensure their education and teaching in conformity with her religious and philosophical convictions, within the meaning of Article 2 of P1. The display of the cross had also breached her freedom of conviction and religion, as protected by Article 9 ECHR. She argued that 'in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth.'

Italy submitted that whether a symbol religious in origin and meaning was capable of exerting influence over individual freedoms was more of a philosophical or ideological question than a legal one. The cross was a religious symbol but it was also an ethical one. It could even be perceived as devoid of religious significance. In any event, there had not been the 'active interference'

89 Mancini, supra n 83 at 10, comments that the constellation of jurisdiction of Italian courts 'has, in the past, enabled different courts to rule differently on the decrees.'
90 See Lautsi, supra n 85 at para 15.
91 Ibid. at para 16. Interestingly, it described 'secularism' as a 'linguistic symbol'.
92 On the relation between public reason and the discourse of human rights, see Hogan, 'Religions and Public Reason in the Global Politics of Human Rights', in Biggar and Hogan, supra n 61 at 216.
94 Harris et al., ibid. at 425–41.
95 Lautsi, supra n 72 at para 31.
that was necessary to found a violation. National authorities enjoyed a wide margin of appreciation in relation to such complex and sensitive questions, closely linked to culture and history. The display of a religious symbol in public places did not exceed the ‘margin of appreciation’ left to states. Displaying the sign of the cross did not breach the State’s duty of impartiality and neutrality. There was no European consensus on the way to interpret the concept of secularism in practice, so that States had a wider margin of appreciation in the matter. Although there was a European consensus concerning the principle of the secular nature of the state, there was no such consensus about its practical implications or the way to bring it about. The decision whether to keep crucifixes in classrooms was a political one and therefore one to be taken on the basis of what was expedient, rather than according to legal considerations. The Italian Republic, although secular, had freely decided to keep crucifixes in classrooms for various reasons, including the need to reach a compromise with political parties having Christian leanings that represented an essential part of the population and its religious feelings.

B. The Judgment of the Chamber

In November 2009, a unanimous Chamber of seven judges, including the judge of Italian nationality (Zagrebelsky), found in Lautsi’s favour. The Chamber recalled the principles elaborated in previous cases regarding the interpretation of Article 2 of PI: it must be read in the light of Article 9; it was designed to safeguard pluralism in education (in both the public and the private sectors), which was fundamental to preserving a democratic society. Given the power of the modern state, public education assumed primary responsibility for fulfilling this objective; the school should not become a platform for missionary activity or preaching: rather, it should be a place where pupils encountered and acquired knowledge of different religions and philosophical convictions; the state must ensure that the knowledge and information it imparted as part of its educational programmes was communicated objectively, critically and consistently with the principle of pluralism; the right to respect for the religious convictions of parents and the beliefs of children encompassed the right


97 Lautsi, supra n 72 at paras 34–44.

98 The other six were Tulkens (Belgium), President, Cabral Barreto (Portugal), Jočiūnienė (Lithuania), Popović (Serbia), Sajo (Hungary) (who has published extensively on secularism, see supra nn 13 and 58) and Karakaş (Turkey).
to believe or not to believe in a religion: both were protected under Article 9 ECHR. The state’s duty of neutrality and impartiality precluded any assessment by the state of the legitimacy of religious conviction or the means by which such conviction was expressed.

In the light of these considerations, the Chamber indicated that states were obliged to refrain from imposing beliefs, even indirectly, in places where persons were dependent on the state or in places where people were particularly vulnerable. The education of children represented a particularly sensitive area in which the state’s power was imposed on minds that were still lacking the critical capacity that would allow them to distance themselves from a message derived from the state’s manifested preference in religious matters.99 In countries where the vast majority of the population adhered to one religion, the manifestation of the observances and symbols of that religion could constitute pressure on the students who did not practise that religion.100 Contrary to Italy’s arguments regarding the symbolic nature of the crucifix, the Chamber was of the opinion that the religious meaning was the predominant one. The presence of the crucifix in classrooms went beyond the use of symbols in specific historical contexts.101 The fact that the crucifix had a traditional symbolism in Italy did not deprive it of its religious character. Lautsi saw the display of the crucifix as a ‘sign that the State takes the side of Catholicism’.102 The Chamber noted the official significance accorded by the Catholic Church to the crucifix as a fundamental symbol of Christ’s message. As such, Lautsi’s concern was not arbitrary.

In the context of public education, crucifixes were necessarily perceived as an integral part of the school environment and could therefore be considered as ‘powerful external symbols’.103 The presence of the crucifix—which it was impossible not to notice in the classrooms—could easily be interpreted by pupils of all ages as a religious sign and they would feel that they were being educated in a school environment bearing the stamp of a given religion. This could be encouraging for religious pupils, but also ‘emotionally disturbing’ for pupils who practised other religions or were atheists, particularly if they belonged to religious minorities.104 The freedom not to believe in any religion was not limited to the absence of religious services or religious education: it extended to practices and symbols which expressed a belief, a religion or atheism.

99 Lautsi, supra n 72 at para 48 (emphasis added).
100 Ibid. at para 50 (emphasis added).
101 Ibid. at paras 51–2 (emphasis added).
102 Ibid. at para 53.
103 Ibid. at para 54, citing the description of an Islamic headscarf on a primary school teacher in Dahlab v Switzerland 2001–V (the children concerned in that case were aged between 4 and 8).
104 Ibid. at para 55.
This freedom deserved particular protection if (i) it was the State which expressed a belief and (ii) the individual was placed in a situation which he or she could not avoid, or could do so only through a disproportionate effort and sacrifice.105

The display of one or more religious symbols could not be justified either by the wishes of other parents who wanted to see a religious form of education in conformity with their convictions or by the need for a compromise with political parties of Christian inspiration.106 Respect for parents’ convictions with regard to education had to take into account respect for the convictions of other parents. The state had a ‘duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought’.107 The Chamber was unable to see how the display, in classrooms in state schools, of a symbol that could reasonably be associated with Catholicism (the majority religion in Italy) could serve the educational pluralism that was essential to the preservation of a ‘democratic society’ as that was conceived by the ECHR, a pluralism that was recognised by the Italian Constitutional Court.

The Chamber concluded that the compulsory display of a symbol of a given faith in premises used by the public authorities, and especially in classrooms, thus restricted the right of parents to educate their children in conformity with their convictions, and the right of children to believe or not to believe.108 The practice infringed those rights because the restrictions were incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education. Accordingly there had been a violation of Article 2 of PI taken jointly with Article 9.109

Italy argued that Lautsi and her children had suffered no real prejudice. However, under Article 41 of the ECHR (just satisfaction), the Chamber awarded Lautsi 5,000 Euros in respect of non-pecuniary damage. That was not an insignificant sum. There is no explanation of how the sum was determined. It has been argued that ‘the award of damages in the instant case was wholly inconsistent with both the alleged violation and the principles used by

105 Ibid. (emphasis added).
106 Ibid. at para 56.
107 Ibid. (emphasis added). The majority in the German Crucifix case, supra n 150, considered that there was a coercive element because of the concept of compulsory elementary school. For the argument that there is an emerging ‘duty of state neutrality in the field of public school education’, see Temperman, ‘State Neutrality in Public School Education’ (2010) 32 Human Rights Quarterly 865.
108 Lautsi, supra n 72 at para 57. Luca (infra n 143) observes that there was some ambiguity in whether the violation was based on the mere fact of display or the obligation to display.
109 The Chamber held that it was not necessary to consider the facts separately under Article 14 ECHR (non-discrimination).
the Court in assessing damages claims. A mere finding of violation was not considered sufficient because the Italian government had not expressed its readiness to review the provisions governing the presence of crucifixes in classrooms.

4. Political and Legal Responses to the Chamber’s Judgment

A. Political Responses

The political response to the Chamber’s judgment in Lautsi is without precedent in European human rights terms. It caused a storm of political controversy in Italy and elsewhere in Europe. In Italy, except on the far left, the ruling met with condemnation among Government ministers and Italian politicians. They criticized the judgment for its failure to respect Italian identity, rights, culture, history, traditions, values and feelings. The Education Minister, Mariastella Gelmini, stated that ‘[n]o one, not even some ideologically motivated European Court, will succeed in rubbing out our identity.’ Civic opinion in Italy was divided. Lautsi and her husband were allegedly subjected to verbal abuse, including from a government minister, received threatening letters and were victims of acts of vandalism. On a Facebook website, 23,000 people signed up to oppose the judgment. However, over 100 Italian organisations published a joint open letter supporting the Chamber’s decision commenting adversely on the political influence of the hierarchy of the Catholic Church. The President of the Union


111 Lautsi, supra n 72 at para 66. Cf Grzelak v Poland Application No 7710/02, Merits, 15 June 2010, where the finding of a violation constituted in itself sufficient just satisfaction for non-pecuniary damage for a violation of Article 14 taken in conjunction with Article 9 (absence of marks for ‘religion/ethics’ on a school report).


113 See Weiler, ‘Editorial: Lautsi: Crucifix in the Classroom Redux’ (2010) 21 European Journal of International Law 1; and Mancini, ‘State and Nation: Church, Mosque and Synagogue - The Trailer (Editorial)’, supra n 83.


of Italian Muslims, stated that ‘[s]upporters of crucifixes in the classroom should have expected this. In a state that calls itself secular, you can’t oppress all other faiths by displaying a symbol that belongs to one confession.’

The judgment was denounced by the Vatican, which described it as ‘short sighted and ideological’. Pope Benedict XVI has stressed the religious aspect of the crucifix rather than its wider cultural symbol. The crucifix was a fundamental sign of the importance of religious values in Italian history and culture, and was a symbol of unity and welcoming for all of humanity, not one of exclusion. A Vatican spokesman 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.

He also argued that the European Court had no right to interfere in an issue profoundly bound up with the historical, cultural and spiritual identity of the Italian people.

It was notable that the Vatican received support from the Polish Catholic Church, the Greek Orthodox Church and the Patriarch of Moscow and of all Russia. The Russian Patriarch latter 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.’

Under communism in Central and Eastern Europe the ‘forced absence of religious symbols in public places and the presence of bare white washed walls

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118 See Pisa, ‘Vatican’s fury as court bans crucifixes in Italian classrooms because they “breach religious rights of children”’, Daily Mail Online, 4 November 2009.

119 Supra n 117.

120 Hooper, ‘Italy school crucifixes “barred”’, BBC News, 3 November 2009. See also Ratzinger and Pera, supra n 2; and Colina, infra n 125.

121 See Andreescu and Andreescu, supra n 76 at 52–3. See Miroshkinovea, ‘Civil Religion and Religious Symbols in Public Institutions in Russia’, in Ferrari and Cristofori, supra n 5 at 324 (who notes that 45% of the Russian population declares itself religious).

ha[d] ominous ideological undertones.\textsuperscript{123} In the Russian Federation and East/Central Europe there has been a strong revival of religion since the end of the Cold War.\textsuperscript{124} There was some degree of perplexity at the idea that European human rights law might compel the same bare walls that communism had.

The Chamber's judgment was reported to have 'caused the most widespread opposition in the history of the European Court of Human Rights: 20 countries are officially opposed and have joined Italy in the defence of the crucifix'.\textsuperscript{125} In addition to the 10 member states which subsequently intervened in a re-hearing of the case (see below), 10 other States took positions against the Chamber's decision. The governments of Albania, Austria, Croatia, Hungary, Macedonia, Moldavia, Poland, Serbia, Slovakia and Ukraine called into question the decision of the Court and requested that national religious identities and traditions be respected. Several governments insisted that religious identity constitutes the source of European values and of European unity. Strong political divisions on the issue were also expressed in the European Union's Parliament, which came close to adopting resolutions directly on the issue, some of which would have deplored the Chamber's judgment.\textsuperscript{126} A number of EU issues have been considered by the ECtHR\textsuperscript{127} but none has been accompanied by such open and high-level political controversy.

\section*{B. Legal Responses}

On 28 January 2010 the Italian Government requested that the case be referred to the GC of the ECtHR for a rehearing. Meeting on 1 and 2 March 2010, a panel of five judges of the GC quickly accepted that request. The criteria for acceptance for a rehearing are that 'the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance'.\textsuperscript{128} A first indication of the importance of the case is that at the same meeting the panel accepted a referral in one other case but rejected requests in 65 cases.\textsuperscript{129} Second, the hearing of the

\begin{itemize}
\item \textsuperscript{123} Alliance Defence Fund Memo, supra n 110 at 7–8. In the public debate on crucifixes in classrooms in Germany in 1995, reference was made to the attempts to remove crosses from Bavarian schools by the Nazi regime in 1936 and 1941. See Kershaw, \textit{Popular Opinion and Political Dissent in the Third Reich: Bavaria 1933-45} (Oxford: Clarendon, 1983) at 205–8, 340–57.
\item \textsuperscript{124} See Rosenfeld, supra n 12 at 2358.
\item \textsuperscript{125} Colina, 'Why 20 Nations are Defending the Crucifix', available at: http://www.zenit.org/article-299567?l=english [last accessed 1 July 2011].
\item \textsuperscript{126} See Andreescu and Andreescu, supra n 76 at 53–5. Much of the debate was with reference to the EU principle of subsidiarity.
\item \textsuperscript{127} See, for example, \textit{Matthews v United Kingdom} 1999-I; 28 EHRR 361 (on voting rights in elections to the European Parliament).
\item \textsuperscript{128} Article 43(2) ECHR. When accepting requests the panel does not indicate which limb or limbs of this provision are satisfied.
\item \textsuperscript{129} In 2009, the panel accepted 11 requests out of a total of 359, see ECtHR, \textit{Annual Report 2009} (Strasbourg, 2010) at 135, available at: http://www.echr.coe.int [last accessed 11 July 2011].
\end{itemize}
case was expedited and a hearing took place in Strasbourg on 30 June 2010, little more than six months after the Chamber's decision. Third, in accordance with Article 36 ECHR, the President of the Court authorised a number of third parties to present written observations. These were (i) the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation and San Marino; (ii) jointly 33 members of the European Parliament (from eleven different states); (iii) Greek Helsinki Monitor; (iv) Associazione nazionale de libero Pensiero; (v) the European Centre for Law and Justice; (vi) Eurojuris; (vii) jointly the International Commission of Jurists, Interights and Human Rights Watch; and (viii) jointly the Zentralkomitee des deutschen Katholiken, Semaines sociales de France, and the Associazioni critiane lavoratori italiani. Of the interveners all except Greek Helsinki Monitor and the Associazione nazionale de libero Pensiero intervened in support of Italy.

C. The Views of Eight of the Intervening States

Eight out of ten governments listed in (i) above were granted the right to intervene during the oral hearing before the GC. They were represented by a single legal team. Their intervention was limited to the issues of general principle raised by the case and its possible resolution (but not the specifics of the case). Their collective views were presented by Joseph Weiler, Professor of Law at New York University Law School, acting on a pro bono basis. The intervening states argued for a reversal of the approach of the Chamber and its finding of a violation. They argued that states had considerable liberty when it came to the place of religion or religious heritage in the collective identity of the nation and the symbology of the state. In Europe, the Cross was both a national symbol and had religious significance. States had very different practices

130 The period between a Chamber judgment and the oral hearing in the Grand Chamber is often a year. For the webcast see: http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastENmedia?&p.url¼20100630-1/en/ [last accessed 11 July 2011].
131 This is the first time in the history of the Court that 10 member states have simultaneously intervened as a 'third party' in one single case.
132 The Court rejected requests from more than 12 other NGOs, a coalition of 37 professors of law (including John Finnis, Oxford University), see http://www.becketfund.org/files/lautsivitaly-writtencomments.pdf [last accessed 11 July 2011], representing 15 countries and an individual. See http://www.humanistfederation.eu/download/277-ECtHR%20re%20third%20party%20interventions.pdf [last accessed 11 July 2011].
133 See Lautsi, supra n 72 at paras 50–5.
134 The religion of counsel is often irrelevant as a matter of fact and of professional standards. However, Weiler is Jewish and while presenting the case he wore a skullcap (yarmulke). Interestingly, he could not have done so in any French court. Nor could two of the counsel in Al-Skeini v United Kingdom Application No 55721/07, Merits, 7 July 2001, who wore a Sikh turban and an Islamic headdress when appearing before the ECtHR.
135 See Lautsi, supra n 85 at para 47–9; and Weiler, supra n 113.
of acknowledging publically endorsed religious symbols by the state and in
public spaces. Lautsi wanted the Court to impose a duty on Italy to be laïque
but a state did not have to divest itself of part of its cultural identity simply be-
cause the artefacts of such identity might be religious or of religious origin.
The position adopted by the Chamber was not an expression of the pluralism
manifest by the ECHR system, but an expression of the values of the laïque
state. Democracy did not require states to shed their religious identity. The
Chamber had conflated, both pragmatically and conceptually, secularism,
laiçité and neutrality. The principal social cleavage in European states as re-
gards religion was not between religions, but among the religious and the secu-
lar. Secularity (laiçité) was not an empty category, which signified absence of
faith. It was to many a rich world-view which held, inter alia, the political conv-
iction that religion only had a legitimate place in the private sphere and that
there may not be any entanglement of public authority and religion. As a polit-
cial position it was respectable, but certainly not ‘neutral’. The non-laïque
states, whilst fully respecting freedom of and from religion, embraced some
form of public religion. Laiçité advocated a naked public square, a classroom
wall, bereft of any religious symbol. It was legally disingenuous to adopt a pol-
itical position, which split society, and then to claim that somehow it was neu-
tral. Given the diversity of European states on the display of the crucifix on
the wall, there could not be one solution that fitted all states, all classrooms
and all situations. The ‘one rule fits all’ decision of the Chamber was devoid of
historical, political, demographic and cultural context. It was not only inadvis-
able, but undermined the very pluralism, diversity and tolerance which the
ECHR was meant to guarantee and which was the hallmark of Europe. The
Chamber had failed to understand the doctrinal and conceptual field in
which this decision was situated. The European landscape, which accepted as
legitimate a UK and a France, a Malta or Greece or Ireland as well as an Italy,
was a unique and uniquely promising model of tolerance and pluralism. The
Court was dealing with a multiplicity of constitutional orders, not a single one.

The interveners did agree that there was an obligation on states to ensure
that their public schools were not places that were religiously coercive.
Interestingly, they submitted that Lautsi was perhaps entitled to her damages
because the Italian government failed to demonstrate that the use of religious
symology in its classroom was part of a credible programme of education for
tolerance and mutual respect. However, the interveners did not agree with
Italy in all respects. In particular they submitted that the Chamber was right to
reject the argument that the school crucifix was little more than a cultural
symbol that transcended or marginalised its original or outwardly religious sig-
nificance because that would have implied that, if a symbol still maintained its
religious significance, it had no place in the public square. That could not be a
correct reflection of the European constitutional sensibility. In the conditions
of European societies, the naked public square, the naked wall in the school,
was decidedly not a neutral position, which seemed to be at the root of the reasoning of the Court. It was no more neutral than having a crucifix on the wall.

5. The Judgment of the Grand Chamber

A. Composition and Nature

Of the judges in the Chamber in Lautsi, two were eligible to sit as part of the rehearing the GC. These were the President of the Section (Tulkens) and the judge elected in respect of Italy (Zagrebelsky).136 In the event neither took part. Judge Tulkens did not because the practice has developed that the relevant Section President steps down after having sat in the Chamber. The term of office of Judge Zagrebelsky expired on 25 March 2010 so his successor, Guido Raimondi, sat. The GC always includes the President, the Vice-Presidents of the Court and the Presidents of the other Sections.137 Thus, the 17 judges who sat were from France (as President of the Court), Greece (as Vice-President), UK (as Vice-President), Denmark (as Section President), Andorra (as Section President), Malta, Croatia, Estonia, Russian Federation, Norway, Finland, Switzerland, Cyprus, Ireland, Bulgaria and Italy (as the national judge of the defendant state). Although originally nominated by states parties to the ECHR the judges were elected by the Parliamentary Assembly and sit as independent members, not as national delegates.138 Judges commonly vote that the state that nominated them has violated the ECHR. Nonetheless, it is interesting to note that judges from five out of the ten intervening states sat in the GC.139

B. The Judgment of the Grand Chamber

What takes place before the GC is not an appeal. Rather it is a complete rehearing. So the judgment of the GC, delivered on 18 March 2011140 replaced that of the Chamber.141 Essentially the GC held that in deciding to keep crucifixes in the classrooms of the state school attended by Lautsi’s children, the authorities acted within the limits of the ‘margin of appreciation’ left to the state in the

136 Article 27(3) ECHR. Such re-sitting would violate Article 6 ECHR if practiced in a state party.
137 Rule 24(2) of the Rules of the ECtHR.
139 Namely the judges from Bulgaria, Cyprus, Greece, Malta and the Russian Federation.
141 See Mowbray, ‘An examination of the work of the Grand Chamber of the European Court of Human Rights’ (2007) Public Law 507. A Grand Chamber judgment may nonetheless replicate part of the judgment of the Chamber, see, for example, Refah Partisi v Turkey 2003-II; 37 EHRR 1.
context of its obligation to ‘respect’, in the exercise of the functions it assumed in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. Accordingly, by fifteen votes to two, the GC held there had been no violation of Article 2 of PI in respect of the applicants. It further considered that no separate issue arose under Article 9 of the ECHR.142

(i) European consensus and the margin of appreciation

A patent omission in the Chamber’s judgment was the absence of any reference to other European practice or evidence on the existence or otherwise of any European consensus. As noted, Italy sought to rely on its margin of appreciation but the Chamber made no reference to it in its assessment.143 A critical factor in assessing the margin of appreciation is the existence or otherwise of a European consensus on the issue at hand. The ECtHR has never clearly articulated its requirements for determining a consensus. It is more complex than a mathematical calculation. If the issue is framed in broad terms of the church–state relationship then there is clearly no consensus. Sixteen of the 47 member states are confessional states or specifically mention a relationship with a specific religion in their constitutions or founding documents.144 If the issue is framed more narrowly in terms of the right to education then 13 of the 47 member states have made declarations or reservations regarding Article 2 of PI.145 If the issue is more narrowly framed again as simply displaying religious symbols in state schools crucifixes then 11 states either currently display crucifixes or crosses in state schools or courthouses. For example, icons and other religious symbols, such as crucifixes, are on display in both public court houses and in classrooms all across Greece; in Ireland individual schools can display crucifixes because doing so can help maintain their ‘ethos’; Lithuania promotes the display of crucifixes in public; and in Poland crucifixes hang in both Houses of Parliament, public schools and other public places.146 In two of those eleven (Germany and Spain),147 national courts have ruled against the display in a limited area of the state. Even more narrowly the issue could be framed as the mandatory display of the crucifix. If so, Italy appears to be the only state that makes it mandatory and even then there was

142 Ibid. at paras 76–7.
144 Puppinck and Wenberg, supra n 14 at 5.
145 Ibid. On variations in practice related to religious education, see Zengin v Turkey 46 EHRR 44 at paras 30–4.
146 See ‘Appendix on Confessional, Non-Confessional Members of the Council of Europe and States Publicly Displaying Crucifixes in the Council of Europe’, in Puppinck and Wenberg, supra n 14 at 21–46.
147 Infra nn 150–3.
some legal uncertainty as to whether the display was mandatory or discretionary as a matter of law and as a matter of practice.\textsuperscript{148}

It was arguable that national judicial precedents were turning against the presence of crucifixes in state classrooms. In terms of national precedents, the approach of the Chamber in \textit{Lautsi} was similar to that of the Swiss Federal Tribunal in \textit{Comune di Cadro v Bernasconi}.\textsuperscript{149} The Swiss court struck down a regulation of the municipality of Cadro (Ticino) that concerned the obligatory display of the crucifix in all primary school classrooms. It considered that the mere possibility that ‘pupils attending public schools understand the exposition of the cross as adherence to, or preference for, a given religion is enough to dismiss the alleged secularisation of the crucifix’. Some pupils may feel ‘hurt in their religious beliefs by the constant presence at school of the symbol of a religion to which they do not belong’, and the state had the duty to protect and include such pupils, regardless of the significance that the majority attached to the symbol of its religion. There have been crucifixes in schools disputes in Germany, resulting in a 1995 majority ruling from the Federal Constitutional Court striking down the relevant Bavarian law on the grounds that the pressure to learn ‘under the cross’ was in conflict with the neutrality of the State in religious matters.\textsuperscript{150} However, crucifixes only have to be removed if a parent objects to that exhibition for religious reasons and for the time that a pupil attends the class. Bavaria has over 50,000 classrooms, but only 13 petitions have been made to remove crucifixes.\textsuperscript{151} Crucifix cases in Romania have resulted in contradictory court rulings in 2008.\textsuperscript{152} In 2008, a court in Spain required Macias Picavea, a public school in Valladolid, to take down all crucifixes in the classrooms.\textsuperscript{153} In 2009, in Spain, the High Court of Justice of Castile and Leon, ruling in a case brought by an association

\textsuperscript{148} At the hearing on \textit{Lautsi} in the Grand Chamber, Judge Bratza specifically asked for clarification on the mandatory discretionary issue.

\textsuperscript{149} Bundesgericht [BGer] [Federal Court] 26 September 1990, 116 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 252 (Switz.), cited in Mancini supra n 83 at 15.


\textsuperscript{152} See Andreescu and Andreescu, supra n 76 at 56–7.

militating in favour of secular schooling which had unsuccessfully requested the removal of religious symbols from schools, held that the schools concerned should remove them if they received an explicit request from the parents of a pupil.\textsuperscript{154}

The Chamber noted that the jurisprudence of the Italian Constitutional Court was generally heading in a similar direction to the Chamber’s judgment in terms of secularism and educational pluralism. However, it overstated the case when it commented that ‘the Constitutional Court’s case-law also takes that view’ that the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could not serve the educational pluralism which is essential for the preservation of ‘democratic society’ within the Convention meaning of that term.\textsuperscript{155} The Constitutional Court’s jurisprudence had not gone that far and it was perhaps unwise for the Chamber to have sought to anticipate it.\textsuperscript{156} Before the GC, Lautsi argued that only a minority of member states had crucifixes in public school classrooms—8 out of 47: Austria, Bavaria (not a state), San Marino, Greece, Poland, the Slovak Republic, Austria and Spain—and the matter was \textit{sub judice} in the last two of these.

The judgment of the GC in \textit{Lautsi} contained a short overview (526 words) of the law and practice of Council of Europe states. This framed the issue as the ‘presence of religious symbols in state schools’.\textsuperscript{157} The GC noted that in the great majority of them the question of the presence of religious symbols in state schools was not governed by any specific regulations. The presence of religious symbols in state schools was expressly forbidden only in a small number of member states: the former Yugoslav Republic of Macedonia, France (except in Alsace and the \textit{département} of Moselle) and Georgia. It was only expressly prescribed—in addition to Italy—in a few member states, namely, Austria, certain administrative regions of Germany (\textit{Länder}) and Switzerland (\textit{communes}) and Poland. Such symbols were found in the state schools of some states where the question was not specifically regulated, such as Spain, Greece, Ireland, Malta, San Marino and Romania. The question had been brought before the Supreme Courts of a number of states—Switzerland, Germany, Poland, Romania and Spain.

The significant variations in practice supported Italy’s view that, given the applicable legal regulations and the interpretations of secularism and neutrality in its domestic courts, the view of the place occupied by Christianity in Italy’s national history and traditions, and the lack of a uniform conception of

\begin{itemize}
  \item \textsuperscript{154} Case No 3250, 14 December 2009, cited in \textit{Lautsi}, supra n 85 at para 28.
  \item \textsuperscript{155} Ibid. at para 56.
  \item \textsuperscript{156} The ECtHR is on safer grounds when it follows the jurisprudence of the highest national court on an issue: see, for example, ECtHR in \textit{A v United Kingdom} 49 EHRR 29 (following House of Lords jurisprudence on public emergency, discrimination and proportionality).
  \item \textsuperscript{157} \textit{Lautsi}, supra n 85 at paras 26–8.
\end{itemize}
the significance of religion in European society, the choice of the extent and form of crucifix regulations should be a matter that fell within its margin of appreciation.\(^{158}\)

The GC stressed that it was not for it to rule on the compatibility of the presence of crucifixes in State-school classrooms with the principle of secularism as enshrined in Italian law.\(^{159}\) The evolution of the jurisprudence of the Italian courts might continue on a path which one day might lead it to find incompatibility, but that was a matter for the Italian courts. So too if the Italian Parliament made the same decision—as a matter of democratic political choice. Alternatively it might embody the obligation to display in a legal instrument. In doing so it would raise the legal status of the obligation to display to one which could be assessed by the Italian Constitutional Court.

The two dissenting judges (from Switzerland and Bulgaria) approached the issue of a European consensus differently. As the presence of religious symbols in schools was not regulated in the vast majority of member states, it was difficult to draw definite conclusions regarding a European consensus. They observed that, besides Italy, it was in only a very limited number of member States of the Council of Europe that there was express provision for the presence of religious symbols in state schools. In support of their approach, they cited the judgments of the German Constitutional Court and the Swiss Federal Court on how the presence of crucifixes could infringe the duty of state neutrality.

(ii) Religious symbolism

One technique for securing a role for religious symbols in the public sphere is to de-religionise them, that is, to transform the sacred to secular,\(^{160}\) or to trivialise them.\(^{161}\) Thus before the Chamber Italy argued that the cross had become a cultural symbol.\(^{162}\) Before the GC the intervening states disavowed this approach.\(^{163}\) They argued that if the strategy is successful then the majority religions symbols (the Christian crosses) are preserved while the minorities’ religious symbols (Muslim headscarves, Jews’ yarmulkas; Sikhs turbans) are excluded.\(^{164}\) Moreover, as a strategy it is, in the end, destructive of religion.

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158 See Folger and Others v Norway, supra n 28 at para 89; and Şahin, supra n 17 at para 109. See also Spampinato v Italy Application No 23123/04, Admissibility, 29 April 2010 (no common European standard governing the financing of churches or religions, such questions being closely related to the history and traditions of each country).

159 Lautsi, supra n 85 at para 57.

160 Mancini, supra n 7 and 83.


162 Lautsi, supra n 72 at para 40. So too did the minority in the German Crucifix case, see supra n 150.

163 See Weiler, supra n 113.

164 See Mancini, supra nn 7 and 83.
For example, *Salazar v Buono*¹⁶⁵ concerned the constitutionality under the US First Amendment's Establishment Clause of the display in the Mojave National Preserve of an eight-foot-high Latin cross, originally erected by the Veterans of Foreign Wars as a memorial to soldiers killed in military service. The plurality in the US Supreme Court considered that the cross had a complex meaning beyond the expression of religious views. It was not merely a reaffirmation of Christian beliefs. It was a symbol that was often used to honour and respect those whose heroic acts, noble contributions and patient striving help secure an honoured place in history for the Nation and its people. One Latin cross in the desert evoked far more than religion. It evoked thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies were compounded if the fallen were forgotten.¹⁶⁶ The three dissenters considered that a cross conveyed an inescapably sectarian message.¹⁶⁷

A second major issue arises if religious symbols are de-religionised to make them secular. If the crucifix loses its specific religious value and become a general symbol of civilisation and culture this arguably blurs the line between secularism and religion. The crucifix can be used by state authorities and this can lead to government interference in religious matters. It erodes any clear cut distinction between the realm of faith and that of reason, and any possibility of ruling the public sphere according to the dictates of reason.¹⁶⁸ This has echoes of the approach advocated by the Pope.¹⁶⁹

For the GC the crucifix was above all a religious symbol.¹⁷⁰ However, the various elements of religious tolerance in Italian education recited by the GC were a crucial factor in neutralising the symbolic importance of the presence of crucifixes in state schools.¹⁷¹ For Judges Rozakis and Vajic it was indisputable that the display of crucifixes in Italian State schools had a religious symbolism that had an impact on the obligation of neutrality and impartiality of the State. The question was whether the 'extent of the transgression' justified a finding of a violation of the Convention in the circumstances. In their view it did not.¹⁷² Judge Bonello referred to the 'European heritage value [of] an emblem recognised over the centuries by millions of Europeans as a timeless...
symbol of redemption through universal love’. Judge Power agreed with the majority in the GC that the presence of the crucifix was essentially a ‘passive symbol’ insofar as the symbol’s passivity was not in any way coercive. However, she would have conceded that, in principle, symbols (whether religious, cultural or otherwise) were ‘carriers of meaning. They may be silent but they may, nevertheless, speak volumes without, however, doing so in a coercive or in an indoctrinating manner’. However, the uncontested evidence before the Court was that Italy opened up the school environment to a variety of religions and there was no evidence of any intolerance shown towards non-believers or those who held non-religious philosophical convictions.

For the two dissenting judges, Malinverni (Switzerland) and Kalaydjieva (Bulgaria), the crucifix was undeniably a religious symbol. Its presence in classrooms went well beyond the use of symbols in particular historical contexts. Even if it was accepted that the crucifix could have multiple meanings, the religious meaning still remained the predominant one. In the context of state education it was necessarily perceived as an integral part of the school environment and might even be considered as a powerful ‘external symbol’ (a view expressly rejected by the majority).

(iii) Secularism

The GC in Lautsi accepted that the views of supporters of secularism attained the ‘level of cogency, seriousness, cohesion and importance’ required for them to be considered ‘convictions’ within the meaning of Article 9 of the ECHR and Article 2 of PI. Their views were regarded as ‘philosophical convictions’, within the meaning of Article 2 of PI, given that they were worthy of respect in a democratic society, were not incompatible with human dignity and did not conflict with the fundamental right of the child to education. That put secularism on a par, but no more than a par, with other philosophical

173 Ibid., Concurring Opinion of Judge Bonello.
175 Cf France which does the opposite—that is, closes the school environment to a variety of religions and is intolerant towards believers or those who hold religious convictions.
176 In Pillay, infra n 289, the Court considered that it was ‘equally possible for a practice to be both religious and cultural’.
177 Supra n 85, Dissenting Opinion of Judge Malinverni joined by Judge Kalaydjieva at para 5.
178 In the French version of Article 9 ‘beliefs’ is translated as ‘convictions’.
180 Ibid.
convictions, including religiously based ones.\textsuperscript{181} It did not place secularism at the level of an over-arching meta-normative constitutional principle.

In his concurring opinion Judge Bonello was scathing of, and hostile to, Lautsi's complaints and their purported secularist aim. He argued that the ECHR had given the Court the remit to enforce freedom of religion and of conscience, but had ‘not empowered it to bully States into secularism or to coerce countries into schemes of religious neutrality.’\textsuperscript{182} He contrasted the status of freedom of religion as a human right with values cognate to, but different from, freedom of religion, like secularism, pluralism, the separation of Church and State, religious neutrality and religious tolerance. For him these were not values protected by the ECHR, and it was fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion. In short, ‘[i]n Europe, secularism is optional, freedom of religion is not.’\textsuperscript{183} In the light of the historical roots of the presence of the crucifix in Italian schools, removing it from where it had quietly and passively been for centuries, would hardly have been a manifestation of neutrality by the state. Its removal would have been a ‘positive and aggressive espousal of agnosticism or of secularism— and consequently anything but neutral.’\textsuperscript{184} Keeping a symbol where it has always been was no act of intolerance by believers or cultural traditionalists. Rather, ‘[d]islodging it would be an act of intolerance by agnostics and secularists.’\textsuperscript{185}

(iv) Secularism and neutrality

The GC confirmed that in the area of education and teaching Article 2 of P1 was in principle the \textit{lex specialis} in relation to Article 9 of the ECHR. That was so at least where the dispute concerned the ‘respect’ obligation laid on states by the second sentence of Article 2 of P1.\textsuperscript{186} That provision had to be read in the light of the first sentence of the same Article and Article 9 of the ECHR, which imposed on states a ‘duty of neutrality and impartiality.’\textsuperscript{187} States had responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role was to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerned both relations between believers and

\textsuperscript{181} For the argument that secularism is an anti-religious ideology, see Mancini and Rosenfeld, supra n 181.

\textsuperscript{182} Supra n 85, Concurring Opinion of Judge Bonello at para 2.3.

\textsuperscript{183} Ibid. at para 2.5.

\textsuperscript{184} Ibid. at para 2.10.

\textsuperscript{185} Ibid.

\textsuperscript{186} Lautsi, supra n 85 para 59, citing \textit{Folger and Others v Norway}, supra n 158 at para 84; and \textit{Appel-Irrgang and Others v Germany} Application No 45216/07, Merits, 18 March 2011.

non-believers and relations between the adherents of various religions, faiths and beliefs.\(^{188}\)

However, the ‘duty of neutrality’ has been stated by the Court in the context of national disputes between competing religious groups and recognition of religious organisations,\(^{189}\) or where there were elements of religious compulsion—as in the case compulsion to take part in religious activities, to take religious oaths or to have to reveal one’s religion or religious beliefs.\(^{190}\) In such cases it was inconsistent, the Court has stated, with neutrality for the state to resolve the dispute or allow the compulsion. It was a huge conceptual leap by the Chamber to move from that limited version of neutrality to a general duty of neutrality towards religion itself.\(^{191}\) The Chamber seemed ‘to have imported a strong duty of state-neutrality through separation that cannot be found in the Convention’.\(^{192}\) Its judgment was capable of being read as ‘further confirmation of the Court’s tendency to favour absolute secularism in the context of state education and as arguably establishing a “positive right to a secular educational environment”.’\(^{193}\) On one level the Chamber had followed a series of ECtHR judgments upholding prohibitions on the wearing of the Islamic headscarf in public educational establishments because to do so infringed the domestic principles of secularism in Turkey, France and Switzerland, respectively.\(^{194}\) In each case concerning religious symbols in public educational establishments the Court had found in favour of the party arguing for a secular approach.\(^{195}\) However, in the Islamic headscarf cases it had been the state arguing for support for the exclusion of religious symbols/clothing in support of its particular approach to and understanding of secularism. In Lautsi it was an individual arguing for her individual understanding of secularism. Accepting the three state’s arguments did not commit the Court to any particular version of secularism because it relied on the doctrine of the margin of

\(^{188}\) Lautsi, supra n 85 at para 60.

\(^{189}\) For example, Hasan and Chausch v Bulgaria 2000-XI; 34 EHRR 1339; and Metropolitan Church of Bassarabia v Moldova 2001-XII; 35 EHRR 306.

\(^{190}\) Buscarini and Others v San Marino 1999-I; 30 EHRR 208 (Parliamentarians oath); Alexandridis v Greece, supra n 28 (would-be lawyer obliged to reveal that he was not an orthodox Christian); and Folgero, supra n 28 (forced participation in religious activities would give rise to an issue under Article 2 P1).

\(^{191}\) See Evans, supra n 161 at 367–8.


\(^{194}\) Karaduman v Turkey Application No 16278/90, Admissibility, 3 May 1993; Dahlab v Switzerland 2001-V; Şahin v Turkey, supra n 17 at para 116 (‘the principle of secularism... is the paramount consideration underlying the ban on the wearing of religious symbols in universities’); and Dogru v France, supra n 19. See Rorive, ‘Religious Symbols in the Public Space: In Search of a European Answer’ (2008–09) 30 Cardozo Law Review 2697; and McGoldrick, supra n 8.

\(^{195}\) See Gibson, ‘Right to Education in Conformity with Philosophical Convictions’ (2010) European Human Rights Law Review 208 at 212, who submits that the Chamber’s approach should have been supported rather than the decisions in Dahlab, Karaduman, Şahin and Dogru which permitted states to discriminate against students professing their beliefs.
appreciation. Accepting Lautsi’s argument did. It could be argued that the Chamber had sought to impose a standard of ‘neutrality’ similar to that which was imposed by France or Turkey, on a member state of wholly different historical backgrounds and cultural conditions. For example, the question before the ECtHR in *Dahlab v Switzerland* was whether the state exceeded its margin of appreciation in making a determination as to the level of power in a religious symbol. In contrast, the Chamber in *Lautsi* itself determined that the crucifix *may* be too powerful. The GC returned to the margin of appreciation approach in *Dahlab*.

For the two dissenting judges the effective protection of the rights guaranteed by Article 2 of P1 and Article 9 of the ECHR required states to observe the ‘denominational neutrality’. This was not limited to the school curriculum, but also extended to ‘the school environment’. As primary and secondary schooling were compulsory, the state should not impose on pupils, against their will and without their being able to extract themselves, the symbol of a religion with which they did not identify. In doing so, Italy had violated Article 2 of P1 and Article 9 of the ECHR.

(v) ‘Indoctrination’ as the limit of neutrality

As noted, the ECtHR has accepted that a variety of church–state relationships can comply with ECHR standards, including Article 9. However, if Article 2 of P1 must be construed together with Article 9, then the broadly stated ‘confessional neutrality’ as understood and applied by the Chamber in *Lautsi*, appeared to undermine this interpretation of Article 9. The GC re-affirmed that Article 2 of P1 was principally a protection against ‘indoctrination’ by the state and teachers. As clearly established in earlier ECHR jurisprudence, the stressing of one religion over another based on the national history and tradition of the respondent State did not in and of itself illustrate a departure from the principles of pluralism and objectivity amounting to ‘indoctrination’.

196 See Langlaude, ‘Indoctrination, Secularism, Religious Liberty and the ECHR’ (2006) 55 International and Comparative Law Quarterly 919 (expressing concern that Court was imposing its own conception of secularism).

197 Puppinck and Wenberg, supra n 14.

198 Ibid. at paras 2–3.

199 They cited in support the Committee on the Rights of the Child, General Comment No 1: The aims of education, 8 IHRR 603 (2001) at para 8; and the decision of the Supreme Court of Canada in *Ross v New Brunswick School District* [1996] 1 S.C.R. 825 at para 100.

200 See *Grzelik v Poland*, supra n 111; and *Kjeldsen et al v Denmark* 1 EHRR 711.

201 *Folgero*, supra n 28 at para 89 (greater priority given to knowledge of Christianity); *Angelini v Sweden* 51 DR (1983); and *Zengin v Turkey* 46 EHRR 44 (greater priority given to knowledge of Islam).
Somewhat surprisingly, the GC made no reference in this context to *Valsamis v Greece*[^202] where the Court took a very robust line in assessing alleged interferences with Article 2 of Protocol No. 1[^203]. In that case, a student (age 12 years) had been punished by a one-day suspension for refusing to participate in a school parade that celebrated a national holiday. As Jehovah’s Witnesses, the family could not participate in any conduct or practice that was associated with war and violence, as pacifism was a fundamental tenet of their religion. They argued that participation in the ‘National Day’ would violate their beliefs because the holiday celebrated the outbreak of war between Greece and Fascist Italy on 28 October 1940 and was commemorated with school and military parades. Additionally, the school parade followed an official Mass and was to be held on the same day as a military parade. The facts seem to represent a much stronger interference than in *Lautsi*. However, the Court held that neither the parade’s purpose nor the arrangements for it could offend the applicants’ pacifist convictions to an extent prohibited by the second sentence of Article 2 of Protocol No. 1[^204]. Even the presence of military representatives at some of the parades did not in itself alter the nature of the parades. The Court found that the parade promoted pacifism and evaluated it as a commemoration of a national event. While the student in *Valsamis* had to participate in a parade, in *Lautsi* no active participation or even acknowledgement was required of students in Italy, except their mere attendance in school. In terms of the margin of appreciation, in *Valsamis* the ECtHR considered that ‘it [was] not for the Court to rule on the expediency of other educational methods which, in the applicants’ view, would be better suited to the aim of perpetuating historical memory among the younger generation.’[^205] The Chamber’s approach in *Lautsi* seems to contradict that in *Valsamis*.

For Judge Power neutrality required a pluralist approach on the part of the state, not a secularist one. It encouraged respect for all world-views rather than a preference for one.

(vi) Respect

In *Lautsi*, the GC confirmed that the word ‘respect’ in Article 2 of Protocol No. 1 meant more than ‘acknowledge’ or ‘take into account’. In addition to a primarily negative undertaking it implied some positive obligation on the part of the state. However, the requirements of the notion of ‘respect’ varied considerably from case to case, given the diversity of the practices followed and the situations obtaining in the states. As a result, the states enjoyed a wide margin of appreciation in determining the steps to be taken to ensure compliance with the

[^202]: 1996-VI; 24 EHRR 294.
[^203]: Similarly, in *Konrad and Others v Germany* 2006-XIII; 44 EHRR SE8.
[^204]: *Valsamis v Greece*, supra n 202 at para 31.
[^205]: Ibid. at para 32.
ECHR with due regard to the needs and resources of the community and of individuals. In the context of Article 2 of P1, that concept implied in particular that this provision could not be interpreted to mean that parents could require the state to provide a particular form of teaching.\footnote{Lautsi, supra n 85 at para 61, citing, \textit{inter alia}, Bulski v Poland, supra n 73.}

The GC referred to its case-law on the place of religion in the school curriculum according to which the setting and planning of the curriculum fell within the competence of the States.\footnote{Citing Kjeldsen, Busk Madsen and Pedersen v Denmark, supra n 200 at paras 50–3; Folgerø, supra n 28 at para 84; and Zengin, supra n 201 at paras 51–2.} In principle it was not for the Court to rule on such questions, as the solutions might legitimately vary according to the country and the era. In particular, the second sentence of Article 2 of P1 did not prevent states from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It did not even permit parents to object to the integration of such teaching or education in the school curriculum. However, as its aim was to safeguard the possibility of pluralism in education, it required the state, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum was conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The state was forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.\footnote{The Court has had real problems in drawing fine lines on religious indoctrination as \textit{Folgerø} itself illustrates (9–8 majority). See White and Ovey, \textit{Jacobs, Ovey and White, The European Convention on Human Rights}, 5th edn (Oxford: Oxford University Press, 2010) at 518; and Evans, ‘Religious Education in Public Schools: an International Human Rights Perspective’ (2008) 8 \textit{Human Rights Law Review} 449.} That was the limit that the States must not exceed.\footnote{Lautsi, supra n 85 at para 62.}

The GC then assessed the facts of the case in the light of these principles. The presence of crucifixes in state-school classrooms fell within the scope of the state’s obligation to respect the religious and philosophical convictions of parents as states were bound ‘in the exercise’ of all the functions which they assumed in relation to education and teaching. That included the organisation of the school environment where domestic law attributed that function to the public authorities.\footnote{Ibid. at para 63.} In general, where the organisation of the school environment was a matter for the public authorities, that task must be seen as a function assumed by the state in relation to education and teaching.\footnote{The two dissenting judges, Malinverni (Switzerland) and Kalaydjieva (Bulgaria), agreed with this approach to the environment.}
government had not contested this. The question whether the crucifix was charged with any other meaning beyond its religious symbolism was not considered to be decisive at this stage of the GC’s reasoning.\textsuperscript{212} There was no evidence before the GC that the display of a religious symbol on classroom walls might have an influence on pupils and so it could not reasonably be asserted that it did or did not have an effect on young persons whose convictions were still in the process of being formed.\textsuperscript{213} It was understandable that Lautsi might see in the display of crucifixes in the classrooms of the state school formerly attended by her children a lack of respect on the state’s part for her right to ensure their education and teaching in conformity with her own philosophical convictions. However, her subjective perception was not in itself sufficient to establish a breach of Article 2 of P1.\textsuperscript{214} The GC’s reliance on the lack of evidence is particularly interesting. In previous religious clothing cases the Court either ignored evidence that the wearing had not actually caused any problems or made its own assertions about their possible effects (Dahlab, Sahin).\textsuperscript{215}

The GC recalled Italy’s explanation that the presence of crucifixes in state-school classrooms was the result of Italy’s historical development, a fact that gave it not only a religious connotation but also an identity-linked one and now corresponded to a tradition that Italy considered it important to perpetuate. Also, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account. The GC’s view was that the decision whether or not to perpetuate such a tradition fell in principle within the margin of appreciation of the State.\textsuperscript{216} It had to take into account the fact that Europe was marked by a great diversity between states, particularly in the sphere of cultural and historical development. Having established that a state could choose to perpetuate such a tradition the GC then seemed to qualify, if not contradict this, by stating that reference to a tradition could not relieve a state of its obligation to respect the rights and freedoms enshrined in the ECHR and its Protocols.\textsuperscript{217} The best reading of this is probably that some traditions will be consistent with ECHR and some will not. As for the government’s opinion on the meaning of the crucifix, it

\textsuperscript{212} Lautsi, supra n 85 at para 66.
\textsuperscript{213} Ibid. (emphasis added). Cf In the German Crucifix case, supra n 150, the German Constitutional Court did seek to make assessment of the impact on children.
\textsuperscript{214} Lautsi, supra n 85 at para 66. See the concurring opinion of Judge Power who made the analogy with offensive speech under Article 10 ECHR.
\textsuperscript{216} In his concurring opinion Judge Bonello provided a strong defence of the respect of national cultural traditions. viz: ‘No court. certainly not this Court, should rob the Italians of part of their cultural personality’. He emphasised the historical role of Christianity in Italy and more specifically in education in Italy.
\textsuperscript{217} Lautsi, supra n 85 at para 68.
was not for the GC to take a position regarding a domestic debate among domestic courts. That seems a most sensible approach to take.

The margin of appreciation enjoyed by states applied to the organisation of the school environment and to the setting and planning of the curriculum. The Court had a ‘duty in principle’ to respect states’ decisions in these matters, including the place they accorded to religion, provided that those decisions did not lead to a form of indoctrination. The reference to a ‘duty in principle’ is a strong statement of where the GC thought such decision making should normally lie. The decision whether crucifixes should be present in Italian state school classrooms was, in principle, a matter falling within its margin of appreciation. The fact that there was no European consensus on the question of the presence of religious symbols in state schools spoke in favour of that approach. The Court’s task was to determine whether the limit of indoctrination had been exceeded. It accepted that by prescribing the presence of crucifixes in state-school classrooms—a sign which, whether or not it was accorded in addition a secular symbolic value, undoubtedly referred to Christianity—the regulations conferred on the country’s majority religion ‘preponderant visibility’ in the school environment. However, that was not in itself sufficient to denote a ‘process of indoctrination’ on the state’s part. It recalled the judgments in Folgerø and Zengin in which it had been accepted that giving a larger share of knowledge to the majority religion, (Christianity in Norway and Islam in Turkey respectively) fell within the respective states’ margin of appreciation and did not constitute indoctrination. The ECtHR has also rejected a complaint concerning mandatory ethics classes for children. The classes were held to be in conformity with the principles of pluralism and objectivity. By introducing them the state’s authorities had not exceeded the margin of appreciation conferred by Article 2 of P1 and they were therefore not obliged to allow a general exemption from the course. Drawing the line at indoctrination gives states a large room for manoeuvre. The fact that the display of the crucifix or any other form of religious symbol is governed by the ‘margin of appreciation’ significantly frees public and private institutions from the danger of legal cases being brought to ban Nativity Displays or prayers at remembrance parades.

Significantly the GC accepted Italy’s argument that a crucifix on a wall was an essentially ‘passive symbol’ and that this was of importance, particularly having regard to the principle of neutrality. It could not be deemed to have an influence on pupils comparable to that of didactic speech or participation in
religious activities. The GC recalled that the Chamber agreed with the submission that the display of crucifixes in classrooms would have a significant impact on the second and third applicants, aged 11 and 13 years at the time. The Chamber had found that, in the context of public education, crucifixes, which it was impossible not to notice in classrooms, were necessarily perceived as an integral part of the school environment and could therefore be considered as ‘powerful external symbols’ within the meaning of the decision in Dahlab. The GC specifically rejected this approach because the facts of the two cases were considered to be entirely different. In particular, Dahlab concerned measures prohibiting the wearing the Islamic headscarf while teaching, which was intended to protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law. After observing that the authorities had duly weighed the competing interests involved, the Court held, having regard above all to the tender age of the children for whom the applicant was responsible, that the authorities had not exceeded their margin of appreciation. Even engaging in a relative approach to the assessment of symbols was inevitably going to leave the GC open to criticism. Islamic headscarves, worn by a minority, may be powerful external symbols that challenge neutrality. However, Christian crucifixes, a symbol of the majority religion, are somehow merely passive and do not challenge neutrality. It may have been better for the GC to have simply accepted that the assessment of the meaning and effect of religious symbols was complex and would be left to the national authorities to assess within the normal bounds of the margin of appreciation.

Moreover, the GC considered that the effects of the greater visibility that the presence of the crucifix gives to Christianity in schools had to be placed in perspective. First, the presence of crucifixes was not associated with compulsory teaching about Christianity. Secondly, Italy opened up the school environment in parallel to other religions. In that connection it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation. Alternative arrangements were possible to

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222 Ibid. at para 72, citing Folgero, supra n 28 at para 94 and Zengin, supra n 201 at para 64. Judge Power’s Concurring Opinion described these cases as being concerned with the ‘preponderant visibility’ of a country’s majority religion within a school environment. Cf Fish’s view that ‘the lesson (of official authority) is enhanced by not being voiced; the absence of didactic speech itself says “you don’t have to be told what this means: you know.” The effect is the one produced in a country where a king or leader-for-life has his picture hung everywhere. Nothing need be said.’ See Fish, ‘Crucifixes and Diversity: The Odd Couple’, New York Times, 28 March 2011. In contrast the German Constitutional Court, supra n 150, considered that the crucifix has an appelational character (appellatives Charakter) for children as it commanded that a certain body of belief was exemplary and worthy of emulation. Visual representations are generally understood to have a more lasting impact than aural ones.

223 See supra n 194.

224 The argument relating to Islamic headscarves can be put in the same terms, this is, that the whole context needs to be considered. A key part of that context can be the secular nature of a state.
help schooling fit in with non-majority religious practices. The beginning and end of Ramadan were often celebrated in schools. Optional religious education could be organised in schools for ‘all recognised religious creeds’. Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or held non-religious philosophical convictions. The applicants had not asserted that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claimed that Lautsi’s children had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions. Finally, Lautsi retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions.

It followed from the foregoing that, in deciding to keep crucifixes in the classrooms of the state school attended by the first applicant’s children, the authorities acted within the limits of the margin of appreciation left to it.

(vii) Parents’ rights

The GC accorded the state a wide ‘margin of appreciation’ in the context of its obligation to ‘respect’, in the exercise of the functions it assumed in relation to education and teaching, the right of parents in Article 2 of PI. It regarded a religious symbol as ‘passive’ and made it clear that the whole educational environment had to be considered as part of the context. It asserted that it had a ‘duty in principle’ to respect the States’ decisions on the place accorded to religion, provided that those decisions do not lead to a ‘form of indoctrination’. Lautsi’s subjective perception was not in itself sufficient to establish a breach of Article 2 of PI. The ‘preponderant visibility’ of a country’s majority religion in the school environment was not in itself sufficient to denote a process of indoctrination. In relation to the range of state functions concerning relation to education and teaching the consequence is to establish a very high bar for parents to satisfy before a violation can be established. Outside of compulsory religious education there should be few violations of parent’s rights that can be established.

225 Evans, supra n 161 at 358–9, observed that the ECtHR in Folgero and in Zengin ‘took a more fully contextual approach to the educational experience of pupils as a whole, rather than focussing on a single aspect of that experience.’ Quaere if all the points mentioned by the GC were reversed in a particular state.

226 Ibid. at para 75.

227 Lautsi, supra n 85 at para 66. See the concurring opinion of Judge Power who made the analogy with offensive speech under Article 10 ECHR.

228 See also Evans, supra n 34 at 332, who submits that individuals invoking freedom of religion have a ‘much higher legal and evidential burden to overcome’ than, for example, a religious group seeking legal registration.
In this context, Judge Rozakis made the interesting argument that the status of the right of parents was decreasing. It was very much a ‘subordinate right’ to the right to education of the child and was not gaining weight in the balancing exercise of the proportionality test of parents to ensure their children’s education in accordance with their religious or philosophical beliefs. The development of multicultural, multi-ethnic societies within national European States meant that children living in that environment were exposed, in their everyday life, to ideas and opinions that went beyond those emanating from school and their parents. They had become accustomed to receiving a variety of frequently conflicting ideas and opinions and the role of both school and parents in these matters had become relatively less influential. It was increasingly difficult for a state to cater for the individual needs of parents on educational issues. Its main concern should be to offer children an education which will ensure their fullest integration into the society in which they lived and prepare them to cope effectively with the expectations that society had of its members. In Judge Rozakis’s opinion, the duties of the state had largely shifted from concerns of parents to concerns of society at large, thus reducing the extent of the parents’ ability to determine, outside the home, the kind of education that their children received.

(viii) Children’s rights

Although Lautsi brought the case in her own name, she also brought it on behalf of her two children. As for her two children the GC considered that, when read in the light of Article 9 of the ECHR and the second sentence of Article 2 of P1, the first sentence of that provision guaranteed schoolchildren the right to education in a form which respected their right to believe or not to believe. It understood why pupils who were in favour of secularism might see in the presence of crucifixes in the classrooms of the state school they attended an infringement of the rights they derived from those provisions. However, for the reasons given in connection with their mother’s case, there had been no violation of Article 2 of P1 in respect of the children. The GC further considered that no separate issue arose in the case under Article 9 of the ECHR.

The GC noted that little argument has been presented in support of the complaint of a violation of Article 14. However, proceeding on the assumption that the applicants wished to complain of discrimination regarding their enjoyment of the rights guaranteed by Article 9 of the ECHR and Article 2 of P1 on account of the fact that they were not adherents of the Catholic religion and

229 See supra n 172.
230 By the time of the judgement of the GC in Lautsi the children had reached majority and confirmed that they wished to remain as applicants.
231 Lautsi, supra n 85 at para 78.
that the children had been exposed to the sight of crucifixes in the classrooms of the state school they attended, the GC held unanimously that it did not see in those complaints any issue distinct from those it had already determined under Article 2 of P1. There was accordingly no cause to examine that part of the application.  

*Lautsi* was determined under Article 2 of P1 in conjunction with Article 9. This reflected the decision in *Folgero* in which the Court held that complaints concerning religious education should be considered under Article 2 of P1 as the *lex specialis* in the area of education. The Chamber held that the compulsory display of a crucifix restricted the right of her schoolchildren to believe or not believe. It reiterated earlier judgments that the school environment should be one that favoured inclusion rather than exclusion, fostered critical thinking in pupils and provided a neutral meeting place for different religious and philosophical convictions. It considered that the display of a crucifix in every classroom in a state school, from which the *Lautsi*'s children could not be removed without considerable hardship, was inconsistent with these principles. Although there was nothing that would be considered a child rights analysis, the Chamber's approach could be viewed as putting children's rights to make an informed choice first. Such a perspective is lost if the Chamber's decision is only framed in terms of secularism versus freedom of religious manifestation and the child's freedom of religion is effectively merged with that of their parents. The GC's view is open to criticism in the sense that it gave no separate consideration to a child's rights perspective, for example, in terms of evolving capacity or participation in determining school rules. Interestingly, the Concluding Observations of the United Nations Committee on the Rights of the Child on Italy in 2003 only made reference to concerns that children, especially in elementary schools, might suffer from marginalisation if they abstained from religious instruction, which was mainly covering Catholic religion and might not be aware that Catholic religious instruction was not compulsory.

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232 Ibid. at paras 79–81.
233 *Folgero*, supra n 201 at para 84. Cf in *Dogru v France*, supra n 19 (expulsion of a schoolgirl for refusing to remove her headscarf during physical education classes) and *Sahin v Turkey*, supra n 17 (woman excluded from studying at university for wearing a headscarf), in which the principal focus was on Article 9 ECHR rather than Article 2 of P1.
234 In the German *Crucifix* case, supra n 150, one of the differences between the majority and the minority was in their assessment of the impact of the crucifix on children and whether it had a missionary character.
236 *Mancini*, supra nn 7 and 83; and *Hunter-Henin*, supra n 73. See also *Lees* and *Horwath*, ‘Religious Parents Just Want the Best for their Kids’ (2009) 23 *Children and Society* 162.
237 The ECHR commonly makes reference to the CRC to assist in its interpretation of the ECHR. See *Neulinger and Shuruk v Switzerland* Application No 41615/07, Merits, 6 July 2010.
238 See CRC/C/15/Add.198, at paras 29–30.
report under the Convention on the Rights of the Child 1989 (CRC), on children’s ‘Freedom of thought, conscience and religion’, contained no reference to the presence of crucifixes in classrooms.239

(ix) Implications for other public institutions and private schools

Lautsi confined her arguments narrowly to the issue of crucifixes in state classrooms. The school in issue was a public institution. However, it is interesting to speculate as to whether the logical outcome of the Chamber’s decision would have to have been the removal of religious symbols from all public institutions and premises.240 The Chamber’s argument that the state should refrain from imposing beliefs in places where individuals are dependent on it is, to various extents, valid for all other public institutions where individuals are dependent on it, for example, prisons, hospitals, care homes, mental health institutions, courtrooms or social welfare offices.241 National courts in Europe have occasionally struck down the practice of placing crucifixes in court houses.242 The Chamber’s principle of denominational neutrality would have been relevant whenever individuals’ presence on the premises of some state institution was compulsory irrespective of religion. In the German Crucifix case the majority distinguished the affixing of crosses in classrooms from the frequent confrontation with religious symbols of the most varied religious tendencies arising in everyday life. The latter did not proceed from the state and did not have the same degree of inescapability.243

The GC stressed that the only question before it concerned the compatibility, in the light of the circumstances of the case, of the presence of crucifixes in Italian State-school classrooms with the requirements of Article 2 of PI and Article 9. It was not required in this case to examine the question of the presence of crucifixes in places other than state schools.244 However, if, as the Court went on to hold, that presence did not violate the ECHR, then its presence in most ‘other’ places—whether public institutions or private ones—would almost inevitably not do so.245

239 See July 2010, CRC/C/ITA/3-4, at 46–50.
240 Andreescu and Andreescu, supra n 76 at 61.
241 Another situation concerns public institutions to which the public have access but are not dependent on the state, for example, a museum, art gallery, library. They may also reflect Christianity as a dominant artistic force. The artworks are passive in one sense but in the context of a museum or art gallery are clearly intended for inter-action with those attending.
243 See supra n 150.
244 Lautsi, supra n 85 at para 57.
245 A challenge under the ECHR to the presence of a crucifix in a polling booth might succeed in as much as there is there is no countervailing tolerant environment.
The presence of religious symbols in prisons has been raised as an issue. In 2008, a British prison declined to include a crucifix in the Christian area of a multi-faith chapel because this symbol was offensive to some. Donaldson v United Kingdom concerned the ban on all prisoners in Northern Ireland wearing, outside their cells, emblems with a political or sectarian connotation. On Easter Sunday, 23 March 2008, D fixed an Easter lily to his outer clothing in commemoration of those Irish republicans who died during or were executed after the 1916 Easter Rising. On refusing to remove the lily, he was found guilty of disobeying a lawful order and was given three days’ confinement in his cell by way of punishment. The Chamber noted that in Northern Ireland many emblems were not simply an expression of cultural or political identity but were also inextricably linked to the conflict and could be viewed as threatening and/or discriminatory by those of a different cultural, political or religious background. Consequently, the public display of emblems could be inherently divisive and had frequently exacerbated existing tensions in Northern Ireland. Therefore, as cultural and political emblems might have many levels of meaning, which could only fully be understood by persons with a full understanding of their historical background, it accepted that states had to enjoy a wide margin of appreciation in assessing which emblems could potentially inflame existing tensions if displayed publicly. The Chamber noted that the Easter lily was considered both by the Prison Service and the Equality Commission as a symbol which was inherently linked to the community conflict as it was worn in memory of the republican dead. It was therefore one of a number of emblems which was deemed inappropriate in the workplace and in the communal areas of Northern Ireland’s prisons. The Chamber recognised that the level of offence caused by a particular emblem cannot alone set the limits of freedom of expression. However, it also recognised that, in times of conflict, prisons were characterised by an acute risk of disorder and emblems, which were more likely to be considered offensive, were also more likely to spark violence and disorder if worn publicly. Consequently, the Donaldson case could readily be distinguished from that of Vajnai v Hungary in which there was no evidence of a real or even remote danger that disorder would be triggered by the public display of the red star.

As for private schools, states also have a positive obligation that the right to respect in Article 2 of P1 is complied with. However, many private schools
in European states are Christian ones. Although there may be a significant
degree of state funding in private schools in some states, it would be remark-
able if the positive obligation extended to requiring private Christian schools
to remove crucifixes from their walls. However, that could have been a reason-
able implication from the Chamber’s judgment. The GC’s approach will give pri-
vate schools much more discretion to make such judgments. In addition, the
fact that the parents have chosen to send their child to a private religious
school may give rise to a non-interference argument from the state. In any
event it will also be part of the contextual evaluation.

Other Council of Europe states will consider the implications of the GC judg-
ment in Lautsi. They will welcome the margin of appreciation afforded to
them. However, there may be concerns if the Court looks too closely at the hol-
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252 See McRea, ‘Lautsi Ruling No Proof of Support for Religious Education System’, The Irish Times,
11 April 2011.

253 See the Human Rights Committee, Concluding Observations regarding the Republic of

254 See Temperman, supra n 107; and Mawhinney, ‘Freedom of Religion in the Irish Primary

255 Arslan and Others v Turkey Application No 41135/98, Merits, 23 February 2010.
gathering. The Court emphasised that in contrast to other cases, the case concerned punishment for the wearing of particular dress in public areas that were open to all, and not regulation of the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion. The Court noted that the applicants did not have any official status, but were simple citizens and that Court jurisprudence concerning civil servants did not apply. It also noted that they were convicted for the wearing of particular clothing in public areas that were open to all and not of any regulation addressing the wearing of religious symbols in public establishments where religious neutrality might take precedence over the right to manifest one's religion. In addition, the Court found no evidence that the applicants represented a threat to public order or that they were involved in proselytism.  

(x) Majorities and minorities

There is an orthodoxy in human rights law that the majority culture can and generally will look after itself through the normal operation of the democratic processes. The ECHR thus has an important role in protecting individuals and minorities from some of the effects of majoritarian rule. *Dudgeon v United Kingdom* (homosexuals), *Goodwin v United Kingdom* (transsexuals) *Connors v United Kingdom* (gypsies), and *D.H. v Czech Republic* (Roma schoolchildren) are good examples. The results of such cases allows those individuals and minorities to continue with practices and lifestyles that are not shared by the majority, or to be protected in ways comparable to the majority population. In such cases the margin of appreciation is applied and revealed as a complex, subtle and pragmatic device for adjudicating on conflicts of rights. In applying it the ECtHR does give weight to the majoritarian democratic legitimacy of a decision but it is only one factor. However, it has been observed that, in *Lautsi*, by refusing to resolve a conflict between the religious majority and ideological/religious minorities on the basis of the doctrine of margin of appreciation, the Chamber embraced a counter-majoritarian
The result of not using the margin as a tool of analysis was that the rights of the Christian majority were simply overridden by the assertion of what in effect becomes a European wide ‘constitutional’ rule or principle supported by arguments of excluding or disrespecting individual members of minorities. Such a result can only be justified where the infringement on individuals or minorities was very substantial and so the fair balance between individual and community rights was upset, and/or when there was a strong European consensus. For the ECtHR to take minority rights seriously is to be welcomed. However, simply overruling the rights of the majority in a democracy needs a much stronger justification than was provided by the Chamber in Lautsi.

(xi) A Christian Europe?

As noted, the GC’s view was that the decision whether or not to perpetuate a tradition fell in principle within the margin of appreciation of the State. Historically, those traditions have been dominated by Christianity. The inevitable consequence is that non-dominant traditions (i.e. minority, non-Christian ones) will not be equally represented or perpetuated in the public reasoning and public visual squares. Added to that, the ECtHR has accepted that, in the defence of a secular order, a state can prohibit the wearing of Islamic headscarves in schools, and even in universities. A number of
German Länder have adopted laws that prohibit public servants and specifically teachers from wearing Islamic symbols, but explicitly permit Christian ones.\(^\text{272}\) In both Germany and Italy the preferential treatment of Christian symbols, such as the crucifix, are thus seen as being culturally and traditionally associated with the state and, therefore, potentially compatible with state neutrality. However, Muslims headscarves are not seen as compatible with this Christian tradition. The headscarf-hijab has been seen as a challenge to secularism because of its religious and political symbolism.\(^\text{273}\) In 2011, a French law came into effect banning the wearing of the Islamic veil in public on pain of arrest and fine. The law will inevitably be challenged before the ECtHR.\(^\text{274}\) A number of applications concerning the 2009 decision by Swiss voters to prohibit the building of minarets have been submitted to the Court.\(^\text{275}\)

It has been suggested that Christianity and Christian values have been defended even at the expense of trampling on fundamental individual freedoms, because the ECtHR does not perceive them as conflicting with the core values of the Convention system. Islam, on the other hand, even when it is the vast majority’s religion (as with Turkey), has been restrictively regulated on the ground that it threatens the democratic basis of the State.\(^\text{276}\) Assessing the value of the ECHR to Muslims is a complex task.\(^\text{277}\) However, the problem is also one of public and political perception. After the Chamber’s judgment in Lautsi, Evans raised the perception problem of the ECtHR telling the Swiss they could not say no to minarets while telling the Italians that they could not say yes to crucifixes in the classroom.\(^\text{278}\) After the GC’s judgment in Lautsi it is conceivable that the different perception problem would be one of telling the Swiss they can say no to minarets while telling the Italians that they can say yes to crucifixes in the classroom.\(^\text{279}\) It has been argued that the GC’s decision in Lautsi, ‘confirms the Christian-centric outlook of European


\(^{273}\) Indeed, it has been described as ‘the symbol of the march of Islamic fundamentalism across Christian Europe’, see Henley, ‘Europe Faces Up to Islam and the Veil—Muslims Claim Discrimination in Legal Battles Over Religious Symbol’, *The Guardian*, 4 February 2004.

\(^{274}\) See Mullally, supra n 7.


\(^{276}\) See Mancini, supra n 83 at 23.

\(^{277}\) For an attempt, see McGoldrick, supra n 36.

\(^{278}\) See Evans, supra n 161 at 345.

\(^{279}\) The argument would be that Switzerland’s architectural environment is part of its history, national tradition and heritage and so within its margin of appreciation.
institutions and it will confirm many Turks' perceptions that as Muslims, they are inevitably viewed with suspicion'.

6. Concluding Comments

A. The Place of Religion in the ECHR

Despite the terms of Article 9 of the ECHR and Article 2 of P1 there has always been some degree of ambiguity as to the proper place of religion in the scheme of the ECHR. That ambiguity may reflect some uncertainty as to its contribution to democratic societies historically and in modern practice. Freedom of religion has never attracted the high status of freedom of expression. There was no substantive jurisprudence on freedom of religion until 1993 but since then it has become a torrent. It has been observed that in many of the ECtHR’s judgments there is an underlying sense that religion is ‘more of a threat than an asset’. The GC’s judgment in Lautsi was more positive with respect to the place of religion or at least the majority religion as reflected in national traditions. Thus within the European public space there is the possibility for states to introduce and maintain legal provisions that reflect religious beliefs even though such provisions would not necessarily satisfy a Rawlsian notion of public reason.

B. The Proper Role of the European Court of Human Rights on Religious Issues

The Court may be a judicial institution but to survive it needs to have political antennae. Alongside Italy, almost half the states of the Council of Europe (21 out of 47) publicly opposed the Chamber’s approach and its perceived attempt at forced secularization of schools. Rather they affirmed the social legitimacy of a Christian identity in European society. This coalition (described by one critic as a ‘Holy Alliance’) which brought together almost the whole of Central and Eastern Europe shows that there are strong internal religious and cultural divisions within the Council of Europe. Moreover, it is not an

280 See Pope, ‘On crucifixes and religious diversity’, Today’s Zaman, 5 April 2011. See generally Ahdar and Aroney, supra n 270.
281 See Kokkinakis v Greece 17 EHR 397.
282 Evans, supra n 34 at 341.
283 See Augenstein, supra n 31.
284 See Pollock, ‘Lautsi v Italy – A Lost Opportunity’, on the website of the European Humanist Federation, available at: http://www.humanistfederation.eu [last accessed 12 July 2011], which referred to the ‘“Holy Alliance” of Catholic and Orthodox states that backed [Italy’s] appeal and by the Vatican, the Greek Orthodox Church and other reactionary religious interests whose fears of losing influence in an increasingly secular Europe will have been abated by this judgement.’
East–West divide, as can be seen in the important support given to Italy by countries of Orthodox tradition, and regardless of the political orientation. The Chamber or the GC might also have made some reference to the Preamble of the Statute of the Council of Europe, which states the devotion of its member states to the ‘spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy’.

It is difficult and dangerous to predict the way the European Court will decide an issue. However, the widespread political condemnation of the Chamber’s decision, the concerted political reaction to it and the legal critiques to which it was subjected augured well for a reversal and so it proved. The Court may be a judicial institution but, as suggested, to survive it needs to have political antennae. The Court supervises a multiplicity of constitutional orders but it is not a Constitutional Court. Thirty-three members of the European Parliament acting collectively specifically made the point that the Court was ‘not a constitutional court and had to respect the principle of subsidiarity’. Nor are the Convention states a single multicultural jurisdiction in the sense that Canada or South Africa are. It can be argued that the courts of the latter have offered greater protection to religious liberty than European Court has. Ideas of multiculturalism and diversity were important in these jurisdictions. Overall, the record of compliance with the Court’s

289 See Multani v Commission Scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256 (Sikh schoolboy wishing to carry kirpan); and Pillay v MEC for Education, KwaZulu Natal and Others, CCT 51/06, [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (Hindu schoolgirl wishing to wear nose stud). In Pillay (paras 80 and 85), the Court found the doctrine of the margin of appreciation unfitting in relation to religious liberty. However, the doctrine of reasonable accommodation played an important role.
judgments is incredibly high. On occasions it may be appropriate for the European Court to effectively lay down a single European constitutional standard even in an area of moral and social controversy.\textsuperscript{291} It is arguable that the GC does have at least more of a constitutional function\textsuperscript{292} given the very basis on which it considers cases is that it raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance. In precedential terms ECtHR’s judgments can be very significant given that all 47 parties to the ECHR have ‘incorporated’ the ECHR in some manner.\textsuperscript{293} Sometimes the ECtHR has faced strong political criticism even when it required a state to adopt a proportionate response to a particular issue.\textsuperscript{294} Judicial authority ultimately depends on the confidence of citizens and there is no real link between the European judges and the European population. If the Court’s interpretations deeply differ from the convictions of the people, the people (and their governments) will start resisting judicial decisions\textsuperscript{295} and the good record of implementing ECtHR decisions will be challenged.\textsuperscript{296} As would have been expected, the Vatican welcomed the judgment of the GC,\textsuperscript{297} while pro-secularists and humanists decried it.\textsuperscript{298}

Assessing the place of religion in the European public square and the developing domestic and European jurisprudence on freedom of religion is, to some extent, always going to be a matter of personal appreciation. Some human rights proponents do not have much time for religion or for its historical or traditional place in European societies or in European public spaces. Thus, they rather supported the approach of the Chamber and will necessarily criticise and seek to downplay the broader significance of the GC’s judgment.

\textsuperscript{291} A leading example is \textit{Goodwin v United Kingdom}, supra n 259, on the treatment of transsexuals. See generally Greer, \textit{The European Convention on Human Rights: Achievements, Problems and Prospects} (Cambridge: Cambridge University Press, 2007) and the literature cited supra n 286.

\textsuperscript{292} See Mowbray, supra n 141.

\textsuperscript{293} For example, the UK Supreme Court has stated that where there was a clear and constant line of ECHR decisions whose effect was not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning did not appear to overlook or misunderstand some argument or point of principle, it would be wrong for it not to follow that line, \textit{Manchester City Council v Pinnock} [2010] UKSC 45, [2011] 2 WLR 220 at para 48.

\textsuperscript{294} See \textit{Hirst v United Kingdom} (No 2) 42 EHR 41 (on prisoners’ voting rights).

\textsuperscript{295} See Mancini, supra n 83 at 27. The 1995 ruling of the German Constitutional Court on crucifixes in classrooms occasioned mass public protests, particularly organized by mothers, and the first call in the history of the Federal Republic by an established political party for citizens to disobey a decision of the highest court, see Caldwell, supra n 150 at 262.


\textsuperscript{298} See European Humanist Federation, supra n 287.
In my view if the GC had confirmed the Chamber’s opinion and, in effect, ordered Italy to remove all crucifixes from all classrooms, or at least from all classrooms where any parent or child had objected, that would have been a major ‘constitutional’ ruling for the whole of Europe. In the current political climate there may have been a sustained political opposition to it across Europe and the European Court’s credibility and even its existence may have been under threat. In my view the GC appreciated that and so ruled as it did. Some will therefore view it as a ‘political’ judgment. However, it is submitted that the question in Lautsi related to the role of European supervision in the field of religious freedoms and, specifically, in addressing complex and subtle identity conflicts between religious majorities and religious minorities. By resorting to the margin of appreciation the ECtHR avoided becoming an arbiter in highly divisive religious issues and avoided potential populist resentment.299

The issues—the narrower one of the place of religious symbols in schools, and the broader one of the foundations of the national and sub-national polities—were returned to the national democratic political and independent judicial folds for evolution and resolution.300 It is submitted that this reflected a sensible and credible judicial strategy of self-restraint for the ECtHR to follow.301

Within the national democratic political and independent judicial forums across Europe, religious believers, authorities and institutions will have to make their case for the place of religion in the public square and defend it. There will continue to be situations where religious doctrine and authority are not persuasive. Similarly, there will be situations where the consequences of acting on religious views are socially unacceptable and the failures of religious authorities and institutions are indefensible.302

299 See Mancini, supra n 83 at 27.
300 Since 2002 a number of Bills regulating the display of crucifixes in state classrooms have been presented but none have become law. Therefore, the Constitutional Court has had no opportunity to consider the constitutionality of such a law. As noted, Italian courts have taken different views on the presence of crucifixes in public spaces: see Zucca, supra n 174.
301 If this conclusion is right then there remains a lingering question as to how the Chamber in Lautsi got the analysis so wrong. Cf on cultural sensitivity in the EU, see Sefton-Green, ‘Multiculturalism, Europhilia and Harmonization: Harmony or Disharmony?’ (2010) 6 Utrecht Law Review 50.
302 See Gledhill, ‘Child Sex Cases ‘Destroyed’ Church Links to State’, The Times, 21 July 2011, citing criticism by the Irish Prime Minister of ‘an attempt by the Holy See to frustrate an inquiry in a sovereign, democratic republic as little as three years ago, not three decades ago.’