

WHY APPEARANCES MATTER. STATE ENDORSEMENT OF RELIGIOUS SYMBOLS IN STATE SCHOOLS IN EUROPE AFTER *LAUTSI*

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A. INTRODUCTION

In Europe, religion continues to exercise a significant, albeit variable influence over the conformation of national identities.¹ Therefore, European states have adopted a panoply of institutional arrangements, ranging from the official recognition of religion to official secularism, in order to reflect the relevance of religion in their particular identity.² The display of Christian religious symbols in state schools is a common means of affirming the role played by religion within the polity. However, this practice has become exceptionally contested out of concern for the protection of the religious freedom of students and of the parental right to raise their children in conformity with their own religious convictions, in accordance with Article 9 and Article 2 of Protocol 1 of the European Convention on Human Rights.

Most recently, the permanent display of the crucifix in the classrooms of Italian state schools was brought under scrutiny before two chambers of the European Court of Human Rights. In 2011, the Grand Chamber of the ECtHR issued its landmark ruling in the case of *Lautsi v Italy*.³ It held that the display of the crucifix did not amount to a violation of the religious freedoms of the applicants, owing to the margin of appreciation afforded to the states in the exercise of their educational functions. This decision overturned the judgment of the Court's Second Chamber. *Lautsi* generated a clamorous public debate, garnering both strong support and tough detraction. It has also been the subject of extensive critical commentary for different reasons. One common criticism focuses on the adequacy of the decision in light of the Court's institutional position as an international tribunal. Another line

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¹ Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 16.

² *ibid*, 17.

³ *Lautsi and others v Italy*, App no 30814/06 (Grand Chamber, ECtHR, 18 March 2011) (*Lautsi* (GC)).

of criticism is characterised by principled arguments intended to elucidate the intricacy of the interpretive concepts underlying the issues presented to the Court.⁴

These analyses, however, overlook the exceptional noteworthiness of the lesson to be drawn from this case: namely, that litigation before the ECtHR alleging violations of the religious freedoms recognised by the Convention, as interpreted repeatedly by the ECtHR itself, is an ineffectual means of challenging the “non-coercive” symbolic nexus between religion and the state. The common criticisms highlighted above are to a great extent misplaced, because one can reasonably conclude that the Court has interpreted the religious freedoms recognised by the Convention adequately. The unease with the symbolic endorsement of religion by the state, however, points to the need to rethink the current situation in Europe through novel arguments that go beyond the protection of the religious freedoms afforded by the Convention. It requires a more profound engagement with the political commitments that culturally diverse states must subscribe to in order to develop and maintain stable and prosperous societies.

In order to fully comprehend the unfair implications arising from the endorsement of religious symbols by the state one must scrutinise the way in which “the state’s symbolic acts and speech affect the status of citizenship, as they enhance or diminish the sense of self-respect that citizens derive from being able to identify with their political institutions”.⁵ This theoretical framework, characterised by Cécile Laborde as a “republican liberal political” viewpoint, questions the moral legitimacy of the symbolic endorsement of religion by the state because it affects the standing of individuals within the political community, either in their benefit or to their detriment, in a manner inconsistent with a rich conception of citizenship that is concerned with the civic status and the recognition afforded to all the members of a democratic society on equal terms.⁶ This approach places the onus on states to rethink their relations with religion as a means of affirming their commitment to political equality, in the face of increasing diversity across the continent.

This argument is illustrated through three main sections. The first section presents an overview of the decisions handed down in *Lautsi* by the Chamber and the Grand Chamber of the ECtHR. The second section analyses the religious jurisprudence of the ECtHR and contends that the Grand Chamber correctly applied it to the case at hand. The third section

⁴ The myriad and often contradicting vindications of concepts such as secularism and neutrality are examples of interpretive concepts as explained by Ronald Dworkin in *Justice for Hedgehogs*, (Harvard University Press 2011) 160-170.

⁵ Cécile Laborde, ‘Political Liberalism and Religion: On Separation and Establishment’ (2013) 21(1) JPP 67, 86.

⁶ *ibid*, 82-86.

will explore the political relevance of a state's symbolic nexus with religion. It explains why appearances matter from the viewpoint of a rich conception of citizenship.

B. THE CASE OF LAUTSI v ITALY

The case of *Lautsi* arose from a complaint launched by a parent against the permanent display of the crucifix in every classroom of an Italian state school attended by her children. She argued that the display of this religious symbol was contrary to the principle of secularism that she sought to inculcate in her children. The mother challenged the school's refusal to remove the crucifix before the national courts. However, an administrative court and the Italian State Council dismissed her complaint, arguing, in general, that the presence of the crucifix in the classroom did not violate her rights or the rights of her children, since it must be viewed as a symbol of Italian history, culture and identity.⁷ The matter was then brought before the Second Chamber of the ECtHR. The applicant alleged that the display of the crucifix constituted an interference with her right to ensure that her children receive an education in conformity with her religious and philosophical convictions under Article 2 of Protocol 1 of the Convention, as well as a violation of the right to freedom of thought, conscience and religion of herself and her children, recognised by Article 9 of the Convention. In its unanimous judgment, the Chamber ruled in favour of the applicants. It reasoned that the crucifix was a "powerful external symbol" with a predominantly religious meaning that could be emotionally disturbing for children belonging to religious minorities.⁸ It further stated that the state has a duty to uphold confessional neutrality in public education.⁹ Therefore, the Chamber concluded that "the compulsory display of a symbol of a particular faith in the exercise of public authority [...] restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe".¹⁰

In accordance with Article 43 of the Convention, the Italian government requested that the case be referred to the Grand Chamber of the ECtHR. A panel of the Grand Chamber granted the request and, in light of its particular significance, the Grand Chamber subsequently granted leave to intervene in the process to a number of actors, including

⁷ *Lautsi* (GC) (n 3) paras 15-16.

⁸ *Lautsi and others v Italy*, App no. 30814/06 (ECtHR, 3 November 2009) paras 51-55.

⁹ *ibid*, para 56.

¹⁰ *ibid*, para 58.

members of the European Parliament, non-governmental organisations, and several states.¹¹ The Grand Chamber overturned the unanimous decision of the Second Chamber by a supermajority. By 15 votes to 2, the Grand Chamber held that there had been no violation of the rights of the applicants given the margin of appreciation enjoyed by the states “in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.¹² This margin extends to the place they accord to religion within the school environment, as long as it does not amount to indoctrination.¹³

The Grand Chamber acknowledged that the margin afforded to the states on this matter is determined in part by the fact that “there is no European consensus on the question of the presence of religious symbols in state schools”.¹⁴ It further contended that, although the display of the crucifix does bestow preponderant visibility upon the religion of the majority, this does not amount to indoctrination, since the crucifix is essentially a “passive symbol”, unlikely to have any influence on the students.¹⁵ Furthermore, the Grand Chamber lent relevance to the fact that the presence of the crucifix is not accompanied by any compulsory religious education and that state schools in Italy are open to students of all religions on equal terms.¹⁶

C. LAUTSI AND THE JURISPRUDENCE OF THE ECtHR

A fair analysis of the jurisprudence of the ECtHR, including *Lautsi*, must recognise the daunting task faced by this court when adjudicating cases concerning religious matters, in light of the manifold relationships that exist among states and religions in Europe, where the absence of neutrality in church-state relations remains the norm.¹⁷ The minimum common denominator unifying the European landscape is some form of national recognition of a right to religious freedom, reinforced by Article 9 and Article 2 of Protocol 1 of the Convention.¹⁸ This, of course, should not be construed as exempting the Court’s judgments on this issue from critical scrutiny. However, acknowledging this state of affairs from the outset highlights

¹¹ The full list of all the intervenors to the case can be found in *Lautsi* (GC) (n 3), para 8.

¹² *Lautsi* (GC) (n 3) para 69.

¹³ *ibid.*

¹⁴ *ibid.*, para 70.

¹⁵ *ibid.*, para 71-72.

¹⁶ *ibid.*, para 74.

¹⁷ *McCrea* (n 1) 36.

¹⁸ *McCrea* (n 1) 38.

the rarity of secular institutional arrangements, particularly notable in France and Turkey, and the formidable interference in the national sphere that the Court would have to undertake in order to lead Europe in that direction. An accurate portrayal of the current situation in most European states is offered by Laborde's ideal-type model of "modest establishment".¹⁹ Under this model, religious freedoms are afforded adequate protection, with the state officially supporting or recognising one or several religions.²⁰ This points to the fact that, while religions have lost some of their substantive influence in the areas of law and politics, they have nevertheless retained a privileged position in the cultural domain.²¹ In this regard, Europe is unique when compared to the rest of the world.²² Therefore, the Court must conciliate the liberal principles that underlie the fundamental values of the Convention with the communal rationales that underpin the particular institutional arrangements chosen by the states.²³

The jurisprudence of the ECtHR on this matter, as synthesised by Ronan McCrea, has "granted priority to the right of states to define their own relationship with religion [and to] promote certain denominations through state institutions".²⁴ State recognition or support of religion, however, is not without limits. In the case of *Refah Partisi v Turkey*, the Court clearly emphasised the role of the state as "the neutral and impartial organiser of the exercise of various religions, faiths and beliefs".²⁵ In order to fulfil this role, the state must refrain from assessing the "legitimacy of religious beliefs".²⁶ This means it must remain impartial regarding the "truth claims" of religious doctrines. The exercise of the state's public function in the educational context is a particularly sensitive issue. Children can be particularly prone to processing information acritically, making them especially vulnerable to religious proselytism.²⁷ The ECtHR acknowledged this point in the case of *Dahlab v Switzerland*.²⁸ Therefore, when discharging its educational responsibilities, the state must ensure that the knowledge imparted to the students is relayed in an "objective, critical and pluralistic

¹⁹ Laborde (n 5) 68.

²⁰ *ibid.*

²¹ Ronan McCrea, 'De Facto Secularism in a Diversifying Religious Environment: The Changing Relationship between State and Religion in Europe' [forthcoming].

²² For a detailed analysis of the level of religious influence throughout the world see in general Pippa Norris and Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (CUP 2004).

²³ McCrea (n 1) 120-21.

²⁴ *ibid.* 121.

²⁵ *Refah Partisi (the Welfare Party) and others v Turkey* App nos. 41340/98, 41342/98, 41343/98 and 41344/98, (ECtHR, 13 February 2003), para 91.

²⁶ *ibid.*

²⁷ Myriam Hunter-Henin, *Law, Religious Freedom and Education in Europe* (Ashgate 2011) 8.

²⁸ *Dahlab v Switzerland* App no. 42393/98 (ECtHR, 15 February 2001).

manner”.²⁹ In other words, the state must not pursue indoctrination.³⁰ Finally, the obligations of the state regarding education are not limited to the curriculum, but also extend to the organisation of the school environment.³¹

This brief account of the relevant precedents of the ECtHR and of the current situation in Europe is meant to show that the Grand Chamber did not depart from its previous rulings in the case of *Lautsi*. On the contrary, it highlights the Court’s “pragmatic acceptance of the continued importance of religion to Member State identity and [its unwillingness] to interpret guarantees of religious freedom in such a way as to interfere with the ability of Member States to define a relationship with religion which reflects their own cultural norms”.³² This acceptance of religion’s cultural role has consistently led the Court to allow the state to symbolically attach itself to religion.³³

Lautsi, of course, is not without inauspicious weaknesses. The cursory characterisation of the crucifix as a “passive symbol”, for instance, may be perceived, given the Court’s previous designation of the Islamic headscarf as a “powerful external symbol” in *Dahlab*, as applying a double standard that unduly distinguishes ‘welcome’ from ‘unwelcome’ religious beliefs, and treats the latter in a discriminatory manner.³⁴ This unfortunate distinction, however, should not detract attention from the fact that the ratio decidendi in both cases relied specifically on the margin of appreciation afforded to the states regarding the nexus that they decide to have with religion.³⁵ In this respect, it is important to note that the Grand Chamber did not endorse the crucifix: it merely ruled that its presence did not interfere with the religious freedoms of the applicants. This points to the fact that the religious freedoms protected by the Convention are not violated by the symbolic attachment of the state to religion, as long as this nexus is “non-coercive”: i.e. “it does not stop anyone from practicing his or her religion or from living a fully secular life”.³⁶ Therefore, in order to reasonably expound the misgivings surrounding the symbolic endorsement of religion, it is necessary to suggest an analysis that goes beyond the recurrent resort to the religious freedoms of the Convention and the subsequent recourse to litigation before the ECtHR.

²⁹ *Folgerø and others v Norway* App no. 15472/02 (ECtHR 29 June 2007), para 86(h).

³⁰ *ibid.*

³¹ *Lautsi* (GC) (n 3) para 63.

³² *McCrea* (n 1) 140.

³³ *ibid.*, 130.

³⁴ Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’ (2011) 13(3) *Ecclesiastical Law Journal* 287, 294; Susanna Mancini ‘The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence’ (2008-9) 30 *CLR* 2629, 2631.

³⁵ The problematic characterisation of the Islamic headscarf as a “powerful external symbol” is found in para 109 of *Dahlab* (n 28).

³⁶ *Laborde* (n 5) 84.

D. WHY APPEARANCES MATTER: THE PROBLEM WITH THE SYMBOLIC ENDORSEMENT OF RELIGION BY THE STATE

Lautsi has attracted a considerable amount of criticism focusing on different aspects of the ruling. A first group of arguments disapproves or commends the judgment in light of the Court's institutional position. Joseph Weiler, for instance, praises the wisdom of the Grand Chamber's decision for its refusal to "short circuit the political and the constitutional adjudicative process in Italy".³⁷ Lorenzo Zucca, on the other hand, argues that the Court's judgment gave Italy too much leeway regarding the flimsy legal basis presented to support the mandate of the crucifix, instead of forcing it to revise its legislation in order to promote a legislative (and perhaps judicial) debate on the matter at the national level.³⁸ Another group of arguments criticises the ruling for its failure to uphold certain values, such as secularism and neutrality. Susanna Mancini, for example, observes that state endorsement of religious symbols in state schools "[challenges] the very legitimacy of the dominant conception of constitutionalism and its nexus to the principle of secularism".³⁹ This argument should be understood in light of Habermas' contention that "[t]he self-understanding of the constitutional state has developed within the framework of a contractualist tradition that relies on 'natural reason', in other words solely on public arguments to which all persons are supposed to have equal access".⁴⁰ However, as András Sajó rightly notes: "most democracies are without a strong normative theory or practice of constitutional secularism".⁴¹ Hence, political commitment to secularism, understood as "an overarching principle of the constitutional state", remains an aspiration.⁴²

While acknowledging the import of all of these assessments, a further possibility of examination has been overlooked by most of these analyses: one that goes beyond the Rawlsian distribution of basic rights, to include more "intangible forms of social recognition".⁴³ In line with the Grand Chamber's decision in *Lautsi*, the display of the crucifix in the classroom can be perceived as a non-coercive endorsement of religion on behalf of the state. Individuals are free to exercise their religious freedoms under the particular arrangements set up by the state, as long as they fall within the margin of

³⁷ JHH Weiler 'Lautsi: A reply' (2013) 11(1) IJCL 230, 233.

³⁸ Lorenzo Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (2013) 11(1) IJCL 218, 227. The Italian government pointed to two royal decrees dating from the 1920s to justify the display of the crucifix.

³⁹ Mancini (n 34) 2629.

⁴⁰ Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14(1) EJP 1, 5.

⁴¹ András Sajó, 'Preliminaries to a concept of constitutional secularism' (2008) 6 IJCL 605, 607.

⁴² Zucca (n 38) 222.

⁴³ Laborde (n 5) 86.

appreciation allowed by the ECtHR. The role of religion is therefore contained within the cultural domain and, as previously suggested, no violation of Article 9 and Article 2 of Protocol 1 of the Convention is to be found in this case. The symbolic endorsement of religion, however, can be said to have an impact that surpasses the scope of protection afforded by the Convention: the presence of the crucifix in the classroom carries with it an expressive function about what that particular community stands for.

This idea was first expounded by Justice O'Connor of the Supreme Court of the United States, a nation with a long history of "modest establishment",⁴⁴ to use Laborde's terms, stemming from the first Amendment of the American Constitution. In her concurrent opinion in *Lynch v Donnelly*, Justice O'Connor argued that religious endorsement by the state "sends a message to non adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favoured members of the political community".⁴⁵ Or as Laborde rightly asserts: "[symbolic endorsement of religion] sends a message that some are not full members of the political community, that they cannot enter the public square on equal terms with others, and this will make it difficult for them fully to identify with their political institutions".⁴⁶ The permanent display of the crucifix in every classroom of Italian state schools can therefore be interpreted as having the effect of making religious affiliation relevant to the individual's standing in the political community.⁴⁷ This is particularly true in contexts where, as in Italy, the overwhelming majority of the population belongs (at least in nominative terms) to one particular religion and, as acknowledged by the Italian tribunals in this case, the symbols of that religion are thought to be a strong component of national identity.

A healthy democratic society requires a strong collective identity.⁴⁸ This can only be achieved through solidarity among citizens of all creeds.⁴⁹ This identity, however, must be made compatible with the plurality of viewpoints and comprehensive doctrines that are deemed to exist in an increasingly diverse society. In this sense, "democracy obliges us to show much more solidarity and much more commitment to one another in our joint political project than was demanded by the hierarchical and authoritarian societies of yesteryear".⁵⁰ In

⁴⁴ Laborde (n 5) 68.

⁴⁵ *Lynch v Donnelly*, 465 US 668 [1984], dissenting opinion Day O'Connor J.

⁴⁶ Laborde (n 5) 84.

⁴⁷ *ibid.*

⁴⁸ Charles Taylor, 'Why We Need a Radical Redefinition of Secularism' in Eduardo Mendieta and Jonathan Van Antwerpen (eds) *The Power of Religion in the Public Sphere* (Columbia University Press 2011).

⁴⁹ *ibid.*

⁵⁰ *ibid.*, 43.

other words, the political institutions that serve as a forum for public deliberation should not alienate a significant number of their own citizens by promoting a particular worldview. In the case of *Lautsi*, the Italian authorities that intervened in the matter did precisely that: they partially credited the Catholic religion with the development of the values of democracy and tolerance. This however, as Ronald Dworkin notes, is paradoxical:

“We believe that religious tolerance is among the most basic of human rights, and we therefore think that it violates people’s rights to force upon them religious doctrines and practices that they do not accept. But is it not exactly what we do when our invading armies march under a banner of religious rhetoric?”⁵¹

The unfair implications of the symbolic endorsement of religion in the public sphere, when it is associated with the exercise of a public function, such as education, are therefore not eliminated, even when the influence of religion is contained within the cultural domain. The consensus of a previously homogeneous society regarding the role played by religion in the community needs to be rethought because, even when distinguishing the “truth claims” from the cultural role of religion, a degree of inequality remains.⁵² Although most European states continue to recognise or support the Christian religious denominations that have historically shaped their own identity, their commitment to political equality suggests a need to clarify and rethink the “unarticulated shared cultural norms which are breaking down as Europe becomes more culturally and religiously diverse”.⁵³ In other words, a preoccupation with the rights of the states to develop and maintain their own culture should not outweigh the fundamental right to treatment as equals of all individuals that all liberal democracies are compelled to uphold. In this sense, a reminder of the Enlightenment’s central achievement is necessary: “getting our fellow citizens to rely less on tradition, and to be more willing to experiment with new customs and institutions”.⁵⁴

In the words of Gabriel and Liviu Andreescu: “[a] lay public sphere is the only solution to ensuring genuine equality between members of majority and minority churches, agnostics, atheists, or non-theists. In the long term, this is the only way to eliminate religious (and anti-religious) tensions”.⁵⁵ Unlike cases such as *Eweida and others v UK*⁵⁶, where the

⁵¹ Dworkin (n 4) 339.

⁵² McCrea (n 21).

⁵³ *ibid.*

⁵⁴ Richard Rorty, ‘Religion as Conversation-stopper’, *Philosophy and Social Hope*, (Penguin Books 1999) 168.

⁵⁵ Gabriel Andreescu and Liviu Andreescu, ‘The European Court of Human Rights’ Lautsi Decision: Context, Contents, Consequences’ (2010) 26 *Journal for the Study of Religions and Ideologies* 47, 67.

⁵⁶ *Eweida and others v the United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR 15 January 2013).

symbolic attachment of an individual to religion can affect members of the majority and of minorities alike, cases like *Lautsi*, where the symbolic attachment to religion is exercised by the state, can mainly affect members of minorities.⁵⁷ This should highlight the risk that the symbolic endorsement of religion is capable of imposing an inferior status of citizenship on members of minorities. It can also have the effect of generating civic divisiveness along religious lines, as conceded by the Supreme Court of the United States in the case of *McCreary v ACLU*.⁵⁸

In light of the above, it is clear that the onus lies on states to change their current institutional arrangements in order to welcome a diverse population without discrimination in the public realm. Achieving the political equality implied by this line of reasoning does not have at its disposal a neat pathway to institutional recognition. It requires the help of a series of mechanisms that incorporate both legislative deliberation and progressive adjudication. What is clear, however, is the need to rely less on the assistance of the ECtHR and the religious liberties of the Convention. *Lautsi* clearly illustrates the limitations of this ineffective approach. The profound political implications for the identity of the state that underlie this case reflect the need for a widespread public debate that takes into account the social diversification of Europe and seriously engages with the changes required to recognise and accommodate this diversity. This will not prove to be an easy task because, as Charles Taylor has pointed out, “contemporary democracies, as they progressively diversify, will have to undergo redefinitions of their historical identities, which may be far-reaching and painful.”⁵⁹ However, a commitment to the values that should guide every liberal democracy indicates that it is a price worth paying.

E. CONCLUSION

The need to develop a better understanding of secular thought and secular practice is tantamount to making this idea appealing. As long as there is a fundamental misunderstanding as to what it requires, the possibility of spreading this idea across Europe seems grim. The divergence of institutional arrangements regarding religion in Europe has made it impossible for the ECtHR to adhere to an interpretation of religious freedoms imposing strict neutrality on states. It has therefore interpreted the duty of states in this matter to be consistent with a margin of appreciation when discharging their public authority in the

⁵⁷ Mancini (n 34) 2629.

⁵⁸ *McCreary County v American Civil Liberties Union* 545 US 844 [2005].

⁵⁹ Taylor (n 48) 45.

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educational context. In the case of *Lautsi*, this meant leaving the decision of whether or not to continue displaying the crucifix in the classrooms of state schools to the Italian authorities.

However, even if the Court found that there is no violation of the religious liberties protected by the Convention arising from the symbolic endorsement of religion by the state, an alternate account of the unjust implications of this practice is possible by relying on a conception of citizenship that is concerned with the recognition of every individual on equal terms. Particularly given the increasing diversity that most European societies are experiencing, states should direct their attention to the issues arising from the lack of political equality. They should be concerned with the political community's ability to develop healthy democratic practices and the changes that they must make to their traditions in order to make this possible.