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LEFT HANGING: THE CRUCIFIX IN THE CLASSROOM AND THE CONTINUING NEED FOR REFORM IN ITALY

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Abstract: Increased immigration throughout Europe and expanding religious pluralism have exerted pressure on European States to make further accommodation for minority religious populations. This poses a challenge for Italy and other European States whose national identities are informed, at least in part, by a single religion. A recent decision by the European Court of Human Rights, holding that Italy could refuse parents’ requests to remove crucifixes from the walls of public school classrooms, has reinvigorated debate throughout Europe on the appropriate place of religion in the public arena. This Comment posits that in issuing this opinion, the Grand Chamber of the European Court of Human Rights has missed an opportunity to provide meaningful insight into the debate on how European States may confront the challenges posed by an increasingly religiously diverse society. As such, European States are left to determine the policies and parameters of religious accommodation individually.

INTRODUCTION

On March 18, 2011, the Grand Chamber of the European Court of Human Rights (ECtHR) issued a judgment in the case of Lautsi v. Italy, in which it declared that the display of crucifixes on the walls of public school classrooms in Italy did not violate the human rights of its citizens, as set forth by the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).1 The decision was delivered in stark contrast to the previous ruling issued by the Second Section of the ECtHR on November 3, 2009, in which the court unanimously held that the public display of crucifixes in Italian public school classrooms did amount to a violation of Article 2 of Protocol No. 1 and Article 9 of the Convention.2 These successive decisions emerge within an ongoing debate in Europe concerning the appropriate place of religion in the pub-

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lic arena.\(^3\) The Grand Chamber’s judgment in *Lautsi* will have broad implications for that debate, and for the search for an appropriate balance between States’ interests in preserving the right to forge and maintain their own State identities and the rapidly evolving need to accommodate an increasingly religiously plural European society.\(^4\)

This Comment proceeds in three parts. Part I provides a background on *Lautsi* and the reasoning used by the Grand Chamber in reversing the Second Section’s decision. Part II discusses how the historical tradition of Christianity in Italy and throughout Europe has informed the European identity, and how the intertwining of these elements poses a challenge for States under the Convention. Part III analyzes in greater detail the text of the Grand Chamber’s opinion, with particular focus upon the court’s use of the “margin of appreciation” doctrine. This section argues that the Grand Chamber failed to contribute any meaningful insight to the debate on how European States may confront the challenges of an increasingly religiously diverse society.

## I. Background

At the start of the case, Soile Lautsi, a Finnish-born Italian national, lived in Italy with her eleven and thirteen year-old sons, Dataico and Sami Albertin.\(^5\) During the 2001–2002 school year, the boys attended the *Istituto comprensivo statale Vittorino da Feltre* (*Istituto*), a State public school in Abano Terme, in the province of Padua.\(^6\) In each of the school’s classrooms, including those rooms in which Ms. Lautsi’s children had lessons, a crucifix hung on the wall.\(^7\) On April 22, 2002, Ms. Lautsi’s husband voiced his concern during a meeting of the school’s governors about the crucifixes in his sons’ classrooms, and inquired whether they could be removed.\(^8\) By a majority vote, the school’s governors decided not to remove the crucifixes from the classroom.\(^9\)

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6. See id.


9. See id.
Ms. Lautsi appealed to the Veneto Administrative Court on July 23, 2002, complaining that the school’s policy infringed upon her right to a secular education for her children under Articles 3 and 19 of the Italian Constitution, and Article 9 of the Convention. The case was dismissed on March 17, 2005 after the Administrative Court ruled that the presence of crucifixes in public school classrooms did not offend the principle of secularism. The court suggested that the crucifix could be used to reinforce Italian identity in the face of an influx of different cultures into Italy, and that “to prevent that meeting from turning into a collision it is indispensable to reaffirm our identity, even symbolically.”

After Ms. Lautsi’s appeal to the Supreme Administrative Court of Italy was defeated, her case was accepted by the ECtHR. On November 3, 2009, the Second Section issued a unanimous judgment in favor of Ms. Lautsi, in which it declared that:

The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion . . . .

The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism . . . could serve the educational pluralism which is essential for the preservation of “democratic society” within the Convention meaning of that term.

The court explained that among the many meanings of the crucifix, the religious meaning was predominant. Its presence in classrooms was therefore capable of both interfering with the Applicant’s right to a secular education for her children, and causing an emotional disturbance for the students of non-Christian or non-religious backgrounds.

Italy appealed the case to the Grand Chamber, and on March 18, 2011, the Grand Chamber reversed the Second Section’s ruling, holding that although “the crucifix is above all a religious symbol,” it is “an essentially passive symbol . . . [i]t cannot be deemed to have an influ-

10 See id.
11 See id. at 65.
12 Id.
13 See id. at 68.
16 Id.
17 Id. at 85.
ence on pupils comparable to that of didactic speech or participation in religious activities.”18 To support its conclusions, the Grand Chamber noted that “there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.”19 The Grand Chamber further explained that in keeping the crucifixes on display in the school’s classrooms, the Istituto’s officials acted within the “margin of appreciation” afforded to Contracting States to make decisions in matters concerning the place accorded to religion within the school environment.20 Provided that such decisions “do not lead to a form of indoctrination,” the Grand Chamber would find no breach of the requirements of the Convention.21

II. DISCUSSION

A. The Christian Tradition

Europe “is the Bible and the Greeks.”22 Certainly, European history may be explained, in large part, by Christendom.23 From its roots as a Jewish millenarian sect of the Roman Empire, Christianity gained momentum after the Edict of Milan, which gave the religion recognition under the law, thereby allowing it to enjoy “the same toleration as other religions.”24 Through the fifteenth century, Europe, as a territory, was marked by a distinctly Christian identity, in which “the idea of a Christian community provided not only a legitimating myth for medieval kingship, but also served as a medium of cultural cohesion for groups otherwise separated by language and ethnic traditions.”25 In effect, Christianity provided the European geographical region with the conceptual basis to distinguish itself from the non-Christian world, as well as a means by which to foster an internal sense of social unity.26

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18 Id. at 87.
19 Id. at 88.
20 Id. at 86.
23 See John T.S. Madeley, European Liberal Democracy and the Principle of State Religious Neutrality, 26 W. Eur. Pol. 1, 8 (2003) (“Europe’s historic association with Christianity is itself unambiguous and strong; indeed it is the only part of the old world which has ever been integrated on the basis of adherence to a single world religion.”).
24 Id. at 10.
26 See id.
Italy, in particular, has fashioned a State identity inextricably tied to its Catholic heritage.\(^{27}\) With the rise of the Savoy monarchy in 1861, Catholicism—the dominant religion throughout the Italian peninsula—provided a means by which to unify a country marked by distinct territorial regions, languages and cultures, where “the fidelity of the new country to ‘its’ religion represented a sort of implicit rule that later influenced all Italian history by nourishing a strong rhetoric of continuity.”\(^{28}\)

As fascism took hold in the country in the early twentieth century, the Italian government issued successive royal decrees requiring the display of crucifixes in Italian primary and middle school classrooms.\(^{29}\) By the end of World War II and the arrival of the new Italian Republic, however, the principle of religious freedom was enshrined in four provisions of the Italian Constitution.\(^{30}\) Article 7 of the Constitution declares that “[t]he State and the Catholic Church are independent and sovereign, each within its own sphere,”\(^{31}\) and Article 8 reads: “All religious denominations are equally free before the law.”\(^{32}\) Although the Italian Constitution guarantees the right of its citizens to religious freedom, and though the prior royal decrees requiring the display of crucifixes in public school classrooms have since been rendered void, the Italian government maintains the view that keeping crucifixes in public school classrooms is “a matter of preserving a centuries-old tradition.”\(^{33}\)

B. The Convention and Europe Today

In the wake of World War II, Italy and other European nations became signatories to the Convention, which entered into force in 1953.\(^{34}\) In an effort to effect greater unity between its members, and to further advance the rights recognized in the 1948 Universal Declaration of Human Rights, the Convention set forth a number of fundamental

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\(^{28}\) Id. at 842.


\(^{30}\) See CONST. OF THE ITALIAN REPUBLIC Dec. 27, 1947, arts. 7, 8, 19, 20.

\(^{31}\) Id. art. 7.

\(^{32}\) Id. art. 8.

\(^{33}\) Lautsi II, 54 Eur. H.R. Rep. at 76.

Article 2 of Protocol 1 affirms that “[n]o person shall be denied the right to education,” and that “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Article 9 of the Convention protects freedom of thought, conscience and religion, and provides:

1. Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In upholding the freedoms guaranteed by the Convention, member nations are free to claim a State religion, or to declare a secularist national government as have both France and Turkey; neither posture conflicts with the Convention. Increased immigration and expanding religious pluralism, however, have exerted pressure on Convention members to further accommodate religious minorities. This poses a challenge for Italy and other Convention members whose national identity is, at least in part, informed by religion.

In response to this challenge, some Convention members—notably, France—have adopted a strict form of secularism, on the view that a shared secular space best encourages social unity, transcending the divisions created by the various inheritance narratives claimed by religious

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36 Convention, supra note 34, protocol 1, art. 2.

37 Id. art. 9.

38 See Álvarez, supra note 3, at 373; Grégor Puppinck, Dir., European Ctr. for Law & Justice, Presentation at the International Law and Religion Symposium: Lautsi v. Italy—The Leading Case on Majority Religions in European Secular States, Presentation at the International Law and Religion Symposium, 4–5 (Oct. 3–6, 2010).

39 See McGoldrick, supra note 4, at 457; Andrea Pin, Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State, 25 Emory Int’l. L. Rev. 95, 140 (2011).

40 See McGoldrick, supra note 4, at 457; Pin, supra note 39, at 140.
groups. Under the French system of laïcité, the relegation of religious expression to the private sphere of society is regarded as an ideologically sound and historically justifiable means to ensure both the freedom of religious practice for all French citizens, as well as the preservation of a political body free from the influence of any one religious doctrine. Recognizing the freedom that laïcité affords members of society within shared, communal public spaces, former French President Jacques Chirac declared that “it is the privileged site for meeting and exchange, where people find themselves and can best contribute to the national community. It is the neutrality of the public space that permits the peaceful coexistence of different religions.”

This form of secularism is one effective means of confronting the challenges of an increasingly religiously plural society. Such an approach, however, is less appealing to—indeed, is opposed by—nations that have an interest in preserving a national identity steeped in religious historical tradition. Professor Joseph H. H. Weiler, in his oral submission to the Grand Chamber on behalf of the third-party intervening States in *Lautsi*, insisted that:

[T]he legal imperative of the Convention should not extend the justified requirement that the State guarantee negative and positive religious freedom, to the unjustified and startling proposition that the State divest itself of part of its cultural identity simply because the artefacts [sic] of such identity may be religious or of religious origin.

Though the Italian Constitution declares a separation between Catholic Church and State, the prevailing “Italian constitutional interpretation believes pluralism is enriched by religious culture and thought in public

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45 See Joseph H.H. Weiler, *State and Nation; Church, Mosque and Synagogue—the Trailer*, 8 INT’L J. CONST. L. 157, 163 (2010) (arguing on behalf of the third party intervening States before the Grand Chamber that States should be able to maintain religiously informed identities as part of their cultural identities).

46 Id.

47 Const. of the Italian Republic Dec. 27, 1947, art. 7; see Ferrari, *supra* note 27, at 849.
institutions such as schools.” 48 Indeed, the Government of Italy argued in Lautsi that “the presence of crucifixes in classrooms made a legitimate contribution to enabling children to understand the national community in which they were expected to integrate,” 49 and that removing these crucifixes “would amount to ‘abuse of a minority position.’” 50

III. Analysis

Ruling in Italy’s favor, the Grand Chamber determined that the decision to keep crucifixes on the walls of public school classrooms was a matter “falling within the margin of appreciation” 51 accorded to Contracting States to decide for themselves the place of religion within public educational institutions. 52 The application in this case of the margin of appreciation doctrine, namely, the principle that international courts should “exercise restraint and flexibility when reviewing the decisions of national authorities,” has been heralded as a triumph of State sovereignty. 53 Proponents of the decision urge that Italy’s victory reaffirms “the freedom of nations/states to include in their self-definition, in their self-understanding and in their national and statal symbology, a more or less robust entanglement of religion and religious symbols.” 54 On this view, granting Italy a wide margin of appreciation to make decisions on whether to allow crucifixes to hang on the walls of public school classrooms “is not unfair given the fact that the Catholic religion is the majority religion practiced in Italy, despite the secular nature of the Italian State.” 55

Although the Grand Chamber’s reliance upon the margin of appreciation doctrine may be legally sound, its effect is to perpetuate the marginalization of minority religions in Italy. 56 Though Italy does not formally engage a State religion, Catholicism is, nevertheless, the dominant religion within the State. 57 Without careful consideration or adop-

50 Id.
52 See McGoldrick, supra note 4, at 475–76.
54 See Weiler, supra note 45, at 158.
55 Puppinck, supra note 38, para. 47.
56 See McGoldrick, supra note 4, at 497.
57 See Puppinck, supra note 38, para. 47.
tion of policies directed at further accommodation of minority religions, “[t]he inevitable consequence is that non-dominant traditions . . . will not be equally represented or perpetuated in the public reasoning and public visual squares.” In effect, the Grand Chamber’s holding provides Italy with an international legal endorsement to maintain a national identity that inevitably excludes individuals and groups whose historical, religious, or cultural traditions are different from those recognized by the State, despite stirrings of discontent from within its population.

In its opinion, the Grand Chamber conceded that application of the margin of appreciation doctrine is not without limit: the court would defer to the decisions of Contracting States “provided that those decisions do not lead to a form of indoctrination.” The court’s task, then, was to determine whether the limit of indoctrination had been exceeded. The problem with the Grand Chamber’s use, in this case, of indoctrination as the limit to the margin of appreciation doctrine is that it suggests that only overt acts of indoctrination could satisfy this standard. Surely, the hanging of crucifixes in public school classrooms has the effect, whether direct or indirect, of indoctrinating students or compelling those who do not belong to Catholicism to feel that they are outsiders within the school environment. As long as the Italian government maintains, as they did in Lautsi v. Italy, that the sign of the cross forms an “identity-linked symbol,” the effect may be to preclude religious minorities from fully participating in educational, civic and social life as “Italians” for want of subscribing to the dominant Italian religious tradition. The Grand Chamber’s holding, in acquiescing to the margin of appreciation doctrine, effectively propagates a policy of non-accommodation in the State’s religiously plural society. Given the reality of expanding religious diversity within its borders, is the outcome in Lautsi really Italy’s victory?

In relying upon the margin of appreciation doctrine, the Grand Chamber failed to contribute any meaningful insight to the debate on how European States may confront the challenges of increasing reli-

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58 McGoldrick, supra note 4, at 497.
59 See id.
61 Id.
62 See Lamb, supra note 35, at 771.
64 See Lautsi II, 54 Eur. H.R. Rep. at 76.
65 See McGoldrick, supra note 4, at 497.
igious pluralism in diverse society with deep historical roots in Catholicism. An alternative approach would have been to encourage further reflection by Italy and other European States on how national policies aimed at greater accommodation of religious pluralism might better serve religious freedom and foster a greater sense of internal unity. Certainly, any specific suggestions made by the Grand Chamber to Italy, such as instituting a system of strict secularism like that of French laïcité, would likely neither be welcomed by Italy, nor be understood by the Grand Chamber as within its ambit to propose. Nevertheless, the Grand Chamber might have encouraged Italy to enter into an “actual dialogue with itself,” and acknowledge the realities of the religious and philosophical traditions within its borders “in order to master the necessary pluralism of [its] future.” As any such suggestions are absent from the Grand Chamber’s analysis, it is left to Italy and other European States, individually, to adopt policy changes aimed at further accommodation of an increasingly religiously plural society. Until they do, the crosses on the walls and the fate of Italy’s religious minorities are all left hanging.

Conclusion

The decision by the Grand Chamber in *Lautsi v. Italy* has reinvigorated an ongoing debate throughout Europe on the appropriate place of religion in the public sphere. Increased immigration and expanding religious pluralism have exerted pressure on Convention members to further accommodate minority religious populations within their borders. This poses a challenge for Italy and other Convention members whose national identity is, at least in part, informed by a single religion. In relying upon the margin of appreciation doctrine, the Grand Chamber’s holding has the effect of perpetuating the unequal representation of minority religions and philosophies in Italy. The victory in the case offers Italy an international legal endorsement to continue its

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71 See id.
religious and educational practices, despite stirrings of discontent from within its population. In the wake of the Grand Chamber’s holding, any trend toward policies of greater accommodation of religious diversity is left to European States to adopt individually, within their own margins of appreciation.