

The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty

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ECtHR in *Lautsi v. Italy*: Mandatory display of crucifix in public schools violates Convention – Secularism and semi-secularism in the Italian Constitution – Italian High Administrative Court: Display of crucifix affirms principle of secularism – Exclusionary effect of display – ECtHR, religious freedom and margin of appreciation: dark side of consensus – ECtHR finally veritably counter-majoritarian

On 3 November 2009 the European Court of Human Rights (ECtHR) held in *Lautsi v. Italy* that the mandatory display of the crucifix in Italian public school classrooms restricts the right of parents to educate their children in conformity with their convictions, and the right of children to believe or not to believe.¹ The Court unanimously concluded that there had been a violation of Article 2 of Protocol No. 1² taken jointly with Article 9 of the European Convention.³

Within a few hours of its becoming public, this decision turned the Court into a target of bitter political criticism and deep popular resentment. The Italian Prime Minister declared that ‘This decision is not acceptable for us Italians. It is one of

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¹ ECtHR 2 Nov. 2009, Case No. 30814/06, *Lautsi v. Italy*.

² Art. 2 – Right to education, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’

³ Art. 9 – Convention for the Protection of Human Rights and Fundamental Freedoms: ‘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 the protection of the rights and freedoms of others.’

those decisions that make us doubt Europe's common sense.⁴ Similar reactions came from virtually the entire Italian political class. The Vatican accused the Court of having delivered a 'short sighted and ideological' decision.⁵ In the northern area of the country, mainly controlled by the populist right-wing Northern League, crucifixes were distributed in the village's main squares, and bylaws were enacted to compel even shopkeepers to display the crucifix. In one case a two-meter-tall crucifix was posted at the gate of a municipality. The judges who took part in the decision were subject to personal attacks. Some even talked about a 'Muslim plot'.

As these reactions show, the implications of the crucifix decision are complex and multi-faceted. Schematically, they relate to three major questions. The first one has to do with the increasing difficulty that constitutional democracies experience in reconciling constitutionalism and religion through adherence to secularism in the public place. The concurrent process of globalisation and privatisation has led to an increasing blurring of the line between the public sphere and the private sphere. In this connection, religion has become 'deprivatised', in a trend started in the 1980s in countries as different as Iran, Poland, Brazil and the United States.⁶ Deprivatised religion not only seeks a greatly increased role in the public sphere but also in the political arena. As a result of this, reconciliation of constitutionalism and religion through adherence to secularism in the public place becomes increasingly difficult and contested. The second question concerns the entanglement between religion and the polity's core identity in secularised societies who experience threats to their self – as a consequence of globalisation, large-scale migration and the aftermath of 11 September. These developments have led to increased demand for social cohesion and for reinforced collective identities,⁷ which accounts for a particular draw towards religious symbols, such as the crucifix, in view of their capacity to evoke unquestioned belongings. The third and last question relates to the role of the European supervision in the field of religious freedoms and, specifically, in addressing national conflicts between religious majorities and religious minorities.

With these questions in mind, in this essay I will first situate the crucifix case in the frame of the Italian legal, political and cultural context, with references to

⁴ Iris Press, 'Crocifisso in aula: Berlusconi, decisione non accettabile non accettabile per noi Italiani', <www.irispress.it/Iris/page.asp?VisImg=S&Art=62934&Cat=1&I=immagini/Politica/berlusconi%2012.jpg&IdTipo=0&TitoloBlocco=Politica&Codi_Cate_Arti=27>, visited 21 Dec. 2009.

⁵ Corriere della Sera.it, 'Via il crocefisso dalle scuole, Vaticano: «Sentenza miope»', <www.corriere.it/cronache/09_novembre_03/crocifisso-aule-scolastiche-sentenza-corte-europea-diritti-uomo_c42aa63a-c862-11de-b35b-00144f02aabc.shtml>, visited 8 Jan. 2010.

⁶ J. Casanova, *Public Religions in the Modern World* (Chicago-London, The University of Chicago Press 1994).

⁷ S. Ferrari, 'Individual Religious Freedom and National Security in Europe After September 11', 2 *Brigham Young University Law Review* (2004) p. 377.

similar cases decided in other European jurisdictions.⁸ I will then highlight the novelty of the *Lautsi* case and emphasise its potentially positive implications in strengthening the counter-majoritarian role of the ECtHR, while at the same time remaining mindful of its possible negative consequences. If, as it seems likely, the Italian institutions and the Italian people will resist the European judgment, this could in fact set the premises for a weakening of the authority of the Court.

SECULARISM AND SEMI-SECULARISM IN THE ITALIAN CONSTITUTION

Unlike in the French Constitution, secularism is not explicitly enshrined in the Italian Constitution. The Italian Constitutional Court, however, has declared that secularism is to be regarded as one of the fundamental principles of the Italian legal system. According to the Constitutional Court,⁹ secularism (*laicità*) emerges from the combined interpretation of various constitutional provisions: Article 2, which protects ‘the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression’; Article 3, which guarantees equality before the law; Article 7, according to which the ‘State and the Catholic Church are, each within their own sphere, independent and sovereign’; Article 8, according to which ‘All religious denominations are equally free’¹⁰ and Article 19, which protects the freedom to profess and promote religious beliefs, individually or collectively. Consistent with its broad foundation, the Constitutional Court constructs secularism as a principle that has multiple constitutional referents, going well beyond the guarantee of freedom of religion. Freedom of religion and secularism are therefore two separate fundamental constitutional provisions.

The Constitutional Court has stressed that the principle of secularism does not mean indifference towards religion, but instead the equidistance and impartiality towards different faiths, which the State is obliged to maintain in order to safeguard the freedom of religion in a context of religious and cultural pluralism.¹¹ Accordingly, unlike the French concept of *laïcité*, which has an undeniably

⁸ This part of my essay draws on my previous works ‘The Power of Symbols and Symbols as Power. Secularism and Religion As Guarantors of Cultural Convergence’, 6 *Cardozo Law Review* (2009) p. 2629, and ‘Talking Secularism (Not Too) Seriously: The Italian Crucifix Case’, I-2 *Religion and Human Rights* (2006) p. 179.

⁹ *Corte Costituzionale*, Decision n. 203/1989.

¹⁰ It is true that the Catholic Church, whose relationship with the State is regulated by the Lateran pacts, enjoys certain privileges. Nevertheless all religious denominations have the right to organise themselves according to their own creed (Art. 8(2) of the Constitution) and can make specific agreements (*intese*) with the State, which are regulated by law, and may confer a wide range of collective rights.

¹¹ *Corte Costituzionale*, Decisions n. 203/1989; n. 259/1990; n. 13/1991; n. 195/1993; n. 421/1993; n. 334/1996; n. 329/1997; n. 508/2000; n. 327/2002.

anticlerical component, secularism Italian-style does not imply neutrality, but a positive or welcoming attitude towards *all* religions and religious communities.

The Constitutional Court, with its ultimate power to interpret the Constitution, has consistently characterised this notion of secularism as equidistance by the state in relation to the different faiths. The Court's interpretation is, however, increasingly contested. Not only the Vatican, but also leading political forces suggest that Italy needs a 'new' understanding of secularism, in order to respond to the relativistic wave that Western democracies are supposedly experiencing in the era of globalisation and large scale migration. In this 'new' understanding, secularism should not place all denominations on an equal footing. Quite to the contrary, for the proponents of this new view, the State should recognise that the 'national religious inheritance' is not just one among several denominations, but rather a crucial component of civic cohesion.¹² Accordingly, the historical national religion should enjoy preferential treatment.¹³ This results in a 'new form of alliance between religion and public power, where the ethical force of the first one upholds the political force of the latter and vice versa.'¹⁴ There is obviously nothing veritably 'new' about this understanding of the relationship between the Church and the State. According to Gustavo Zagrebelsky 'new' secularism is nothing but a 'pale reincarnation of the past, a sort of "semi-secularism" that represents what remains of the old dream of the Christian Republic and which is based on the opposite of the Westphalian principle: *cuius religio, eius et regio*.'¹⁵

The display of the crucifix is mandated by two royal decrees that date back to the 1920s.¹⁶ These decrees had been enacted by the fascist government before the current Constitution came into force (1948), with the aim of introducing a confessional system. This system was actually established by the Lateran Treaty of 1929 with the Vatican, on account of which Catholicism became the official state religion. As the polemic over the presence of the crucifix grew during the various stages of the *Lautsi* case, the Italian Ministry of Education issued a bylaw recommending that headmasters display the crucifix in all school classrooms.¹⁷

Because the display of the crucifix is regulated by administrative acts, the sole judicial authorities competent to void them are administrative courts. The Italian judicial system distinguishes ordinary (i.e., civil and criminal) courts from administra-

¹² G. Zagrebelsky, 'Stato e Chiesa. Cittadini e cattolici', 73 *Passato e presente* (2008) p. 5 at p. 16.

¹³ *Id.* at p. 17.

¹⁴ *Id.* at p. 19.

¹⁵ I.e., instead of the state deciding on the religion of its inhabitants (*cuius regio, eius religio*), the state has adhere to the historical national religion. *Id.* at p. 18.

¹⁶ See Art. 19 of royal decree n. 1297 of 26 April 1928 and Art. 118 of royal decree n. 965 of 30 April 1924.

¹⁷ Ministero della Pubblica istruzione, by law n. 2666 of 3 Oct. 2007.

tive courts. While the latter have the power to void administrative acts for lack of jurisdiction, breach of a law or abuse of power, the former may only decide not to apply them. The decision by an ordinary court not to apply an administrative act can always be reversed in a subsequent case. Finally, the Constitutional Court only decides disputes concerning the constitutionality of laws and acts with the force of law and is therefore not competent to review administrative acts. This constellation has, in the past, enabled different courts to rule differently on the decrees.

For example, in a 2003 much publicised case, a lower ordinary court in the region of Abruzzi ordered the immediate removal of the crucifix from a school classroom upon a challenge by a Muslim parent. This Abruzzi court held that the display violated religious freedom, equality and secularism. Moreover, in the court's opinion, the display of the crucifix did not have any legal basis, because the amendment to the Lateran treaty of 1984 repealed the provision which accorded Catholicism the status of a state-church, thus imposing the obligation of imposing the crucifix in state schools.¹⁸ However, administrative courts have consistently upheld the validity of the two decrees.

The *Lautsi* case originated in the deeply Catholic region of Veneto in 2002. Ms. Soile Lautsi, an atheist parent of Finnish origin, asked the board of the state school attended by her children to remove all religious symbols from the classrooms. Upon rejection of her request, she challenged the decision before the Veneto regional administrative court claiming that the school had violated the Italian Constitution's principle of secularism and the principle of neutrality of the public administration. Ms. Lautsi also alleged that there was a violation of Article 9 of the ECHR,¹⁹ which she asserted defended the right to believe as well as that not to believe.

The decision of the Regional Administrative Tribunal,²⁰ which was subsequently affirmed by the High Administrative Court²¹ occasioned considerable amusement among constitutional law scholars.²² According to the two courts, 'The crucifix ... may be legitimately displayed in the public schools because it does not clash with the principle of secularism, but, on the contrary, it actually affirms it.'

The reason given for this surprising statement was twofold. In the first place, the significance of the crucifix is not univocal, but depends on the location where

¹⁸ *Tribunale dell'Aquila*, 23 Oct. 2003, Court Order *Smith v. Scuola Materna ed Elementare statale 'Antonio Silveri' di Ofena*.

¹⁹ The ECHR has been implemented in Italy by law n. 848 of 4 Aug. 1955.

²⁰ *TAR Veneto*, 17 March 2005, Decision n. 1110, para. 16.

²¹ Consiglio di Stato 15 Feb. 2006, Decision Sez. 4575/03-2482/04.

²² Before deciding the case, the Regional Administrative Court proceeded to submit the matter to the Constitutional Court, but, as expected, the latter decided that it did not have jurisdiction as the acts involved were of an administrative nature. See *Corte Costituzionale*, Court Order n. 389/2004.

it is displayed. In a Church, it has a religious meaning, but in other contexts, such as a school, it may embody social and cultural values which are shared also by non-believers. In the second place, in a school, the crucifix is a religious symbol for believers, but for all it evokes the fundamental state values which constitute the basis of the Italian legal order, including the principle of secularism. Therefore it has an important educative function regardless of the religion of the schoolchildren. According to these administrative judges, inherent in Christianity are the ideas of tolerance and freedom, which constitute the basis of a secular state in general and of the Italian state in particular, because secularism has been achieved in Italy thanks to – amongst other things – the founding Christian values. Therefore it would be a paradox to exclude a Christian symbol from the public domain in the name of a principle such as secularism, which is actually rooted in the Christian religion.

Furthermore, according to the two judgments, in Italy the crucifix is the representation of the religious origin of the values of tolerance, reciprocal respect, human dignity, fundamental rights, solidarity and non-discrimination. The crucifix evokes congruence and harmony between these values and the core doctrine of Christianity and as such reminds ‘schoolchildren of the transcendent foundation of such principles, which shape the secular character of the State.’ According to the Regional Administrative Tribunal, there is ‘a perceptible affinity ... between the essential core of Christianity, which ... focuses on tolerance and the acceptance of the other, and the essential core of the Italian Constitution’, which is based on fundamental rights. The court does admit that, ‘during history, many incrustations were settled on the two cores, and especially on Christianity.’²³ Nevertheless, the harmony between Christianity and the Constitution, endures because ‘despite the Inquisition, anti-Semitism and the Crusades’ it is ‘easy’ (!) to recognise the most profound core of Christianity in the ‘principles of dignity, tolerance and religious freedom and therefore in the very foundation of a secular state.’²⁴ Viewed in this light, the logical conclusion is that the obligation to display the crucifix does not violate any constitutional value, but on the contrary, it affirms such values in a way which underlines their great significance: ‘The crucifix is the symbol of our history and our culture and, as a consequence, of our identity ... and also of the principle of secularism.’²⁵

These paradoxical statements produce a veritable logical short circuit: the obligation to display the crucifix, which was introduced in the frame of a confessional system, has become the symbol of secularism. Said differently, the crucifix, which

²³ *TAR Veneto*, 17 March 2005, Decision n. 1110, para. 11.7.

²⁴ *Ibid.*, para. 11.6.

²⁵ *TAR Veneto*, 17 March 2005, Decision n. 1110, para. 12.4.

was meant to symbolise the confessional relationship between State and Church during the fascist regime, has become the symbol of the separation between State and Church in a liberal context. The administrative courts seem bent on turning their backs to the path that democratic societies have had to follow in order to achieve separation between secular and religious institutions: all the battles and the tragedies that were necessary to achieve this result seem, in their view, essentially to have been avoidable.²⁶ But if that were the case, it is hard to fathom why secularism should continue to imply the separation between State and Church and why it is still necessary to limit the temporal power of the Catholic Church, the guardian of the values (including secularism) that the crucifix expresses.²⁷

Moreover, the arguments sustained by the two administrative courts are challengeable both in law as well as in history. In the first place, there is no legal or constitutional basis to argue that the crucifix is a symbol of national unity and identity. In fact, Article 12 of the Constitution unequivocally states what the symbol of Italian national unity is. According to this provision, 'The flag of the Republic is the Italian tricolor: green, white, and red, in three vertical bands of equal dimensions.' In the interpretation of the Constitutional Court, 'given the fact that the state cannot impose ideological values that are common to citizens as a whole and to each citizen individually', the national flag is a symbol which simply identifies a given state and represents the ideals which constitute the basis of popular sovereignty.²⁸ Moreover, the Italian Constitution is the product of a compromise between political forces with different values and ideologies in the Constituent Assembly (Christian democrats, socialists, communists and liberals). Parts of the Constitution, such as those concerning marriage and family, do reflect the influence of the doctrine of the Church, but other parts (e.g., those concerning workers' rights) clearly show the influence of communist and socialist ideals. Therefore, if all the different ideological roots of the Constitution had to be symbolised in school classrooms, the hammer and sickle should also have to be displayed.

The decision of the two administrative courts echoes a decision by the Bavarian Supreme Court, which in 1991 had similarly separated the religious from the cultural significance of the crucifix:

[w]ith the representation of the cross as the icon of the suffering and Lordship of Jesus Christ . . . the plaintiffs who reject such a representation are confronted with a

²⁶ C. Martinelli, 'La questione del crocifisso tra esperienza giurisprudenziale e intervento parlamentare', in E. Dieni et al. (eds.), *I simboli religiosi tra diritto e culture* [Religious Symbols Between Law and Cultures] (Milan, A. Giuffrè editore 2006) p. 160 et seq.

²⁷ Ibid.

²⁸ *Corte Costituzionale*, Decision n. 189/1987, <www.cortecostituzionale.it/ita/attivitaacorte/pronunceemassime/pronunce/filtro.asp>, 5 June 2006.

religious worldview in which the formative power of Christian beliefs is affirmed. However, they are not thereby brought into a constitutionally unacceptable religious-philosophical conflict. Representations of the cross confronted in this fashion ... are ... not the expression of a conviction of a belief bound to a specific confession. They are an essential object of the general Christian-occidental tradition and common property of the Christian-occidental cultural circle.²⁹

The Bavarian Court therefore concluded that the placing of a crucifix or other representations of the cross in classrooms of State schools does not injure the basic rights to negative freedom of pupils and parents who, on religious or philosophical grounds, reject such representations.

A liberal democracy built on the Enlightenment ideals cannot impose an *obligation* to display the crucifix in public schools without weakening or neutralising its religious significance. The Italian and Bavarian courts had therefore to engage in a process of disarticulation of the semantic significance of the crucifix.³⁰ To pass as part and parcel of enlightenment ideals, the crucifix must lose its specific (religious) value and become a general symbol of civilisation and culture, apt to being freely used by the State to meet the needs of the political community.³¹ This results in the definitive blurring of the line between secularism and religion. On the one hand, secularism is interpreted in a way that makes it compatible with granting privileges to Christianity, and with the overlap between the religious and the temporal spheres.³² That is to say, this interpretation denies the very possibility of a clear cut distinction between the realm of faith and that of reason, and of ruling the public sphere according to the dictates of reason. Accordingly, the new principle that emerges from these decisions should in fact be characterised as ‘post-secular’³³ or ‘confessional’ secularism.³⁴ On the other hand, the use of the crucifix by state authorities produces government interference in religious matters, which is contrary to the principle of separation as well. This last point was actually stressed by the German Federal Constitutional Court in its 1995 judgment striking down the relevant Bavarian law on the grounds that the pressure to learn ‘under the

²⁹ Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] 3 June 1991, 122 Bayerische Verwaltungsblätter [BayVBl] 751 (751-54) (F.R.G.).

³⁰ A. Morelli, ‘Simboli, religioni e valori negli ordinamenti democratici’, in Dieni et al., *supra* n. 26, at p. 85.

³¹ S. Mancini, ‘The Power of Symbols’, *supra* n. 8, at p. 264-268.

³² N. Fiorita, ‘Il crocifisso: da simbolo confessionale a simbolo neo-confessionista’, in Dieni et al., *supra* n. 26, at p. 188.

³³ Zagrebelski, *supra* n. 12.

³⁴ Fiorita, *supra* n. 32 at p. 182 (quoting Edoardo Dieni, Simboli, religioni, regole e paradossi (unpublished manuscript, presented at the Round Table on ‘Crocifisso, velo e turbante. Simboli e comportamenti religiosi nella società plurale, Campobasso’, 21 April 2005)).

cross' is in conflict with the neutrality of the State in religious matters.³⁵ Moreover, according to the Court, not considering the crucifix as a religious symbol connected with a specific religion violates the religious autonomy of Christians and actually produces a desecration of the crucifix itself.³⁶ A similar argument is found in Justice Brennan's dissenting opinion in the US Supreme Court decision in *Lynch v. Donnelly*.³⁷ In *Lynch*, the Court's majority concluded that the city of Pawtucket, R.I., had not violated the Establishment Clause by including a crèche in its annual Christmas display, located in a public park within the downtown shopping district. In Brennan's view, however

The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The import of the Court's decision is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol.³⁸

To recognise that the crucifix, or the crèche, are symbols of a particular confession does not mean, of course, to deny the relevance of the cultural dimension of religion, but simply to condemn the instrumental use of the latter by public authorities. According to Justice Brennan, for example, the purpose of including the Bible or Milton's *Paradise Lost* in a course on English literature is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression. In those cases, the religiously inspired materials are being considered solely as literature.³⁹ In contrast, the presence of the crèche, or, in the Italian case, of the crucifix, in an otherwise secular setting, inevitably serves to reinforce the sense that the state means to express solidarity with the Christian message of such symbols and to dismiss other faiths as unworthy of similar attention and support. It is difficult not to share Brennan's bitter conclusion:

By insisting that such a distinctively sectarian message is merely an unobjectionable part of our 'religious heritage', the Court takes a long step backwards to the

³⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 16 May 1995 (Kruzifix-Urteil), 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.).

³⁶ Ibid.

³⁷ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

³⁸ *Id.* at p. 728

³⁹ *Id.* at p. 712.

days when Justice Brewer could arrogantly declare for the Court that ‘this is a Christian nation’.⁴⁰

The ECtHR, in *Lautsi* referred to the theory of the ‘cultural meaning’ of the crucifix: ‘The crucifix has many meanings, among which the religious one is predominant’ (para. 51), also in view of the fact that the Catholic Church attributes a fundamental value to it (para. 53). This statement is reminiscent of a case decided in 1990 by the Swiss Federal Tribunal. In *Comune di Cadro v. Bernasconi* 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. Switzerland is a particularly good source of comparison for the Italian case, because in the Swiss Constitution the principle of secularism does not imply religion-blindness and strict neutrality. To the contrary, as in Italy, religious communities in Switzerland are granted a legal status and majority religions enjoy certain privileges at the cantonal level. According to the Swiss Federal Tribunal:

The fact that the state authority decides to display the crucifix in school classrooms can be understood as an attachment to tradition and the Christian foundations of civilisation and Western culture. One might therefore believe that this decision/regulation ... does not violate the principle of denominational neutrality, but that it only demonstrates a certain perception of the state at religion and Christian civilisation. The task of the state, however, is to ensure the neutrality of public schools, avoiding any identification with a particular religious denomination.⁴¹

Thus, 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’,⁴² and the state has the duty to protect and include such pupils, regardless of the significance that the majority attaches to the symbol of its religion

THE EXCLUSIONARY EFFECT OF THE DISPLAY OF THE CRUCIFIX

The Italian and the Bavarian crucifix cases offer a particularly salient example of how the entanglement between national identity and the polity’s Christian heri-

⁴⁰ *Id.* at p. 719. The case referred to is *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

⁴¹ *Comune di Cadro v. Bernasconi*, Bundesgericht [BGer] [Federal Court] 26 Sept. 1990, 116 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 252 (Switz.).

⁴² *Id.*

tage actually shapes the understanding of religious tolerance and informs the interpretation of religious rights. Both cases demonstrate how conditional that ‘tolerance’ is and how the rights of citizens belonging to religious and ideological minorities are protected to a much lesser extent than the rights of those belonging to the majority denomination.

In spite of the theological pronouncements of the Italian and the Bavarian courts, the crucifix *can be plausibly* viewed as the symbol of Catholicism, and therefore produce the discrimination of those who do not belong to the latter. This is precisely the view of the European Court of Human Rights, according to which

[t]he presence of the crucifix can be easily interpreted by pupils of all ages as a religious symbol. Accordingly, they will feel educated in a school environment characterised by a particular religion. What may be encouraging for some religious pupils can be emotionally disturbing for pupils belonging to other religions or for those who profess no religion. This risk is particularly high for pupils belonging to religious minorities. Negative freedom is not limited to the absence of imposition of religious services or religious instruction. It covers the practices and symbols expressing in particular or in general, a belief, a religion or atheism. This freedom deserves particular protection if it is the State which expresses a belief and the individual is placed in a situation which he or she cannot avoid, or could do so only through a disproportionate effort and sacrifice (para. 55).

Again, the EctHR judgment echoes the Swiss judgment mentioned above. The Swiss Tribunal stated that the application of secularism (‘state neutrality’) obliges public schools to welcome and respect individuals with different convictions and prevent them from feeling as outsiders. According to the Swiss federal judges, this obligation must be understood as granting special protection to pupils belonging to religious minorities which do not enjoy an official status and to those which are atheistic, agnostic or indifferent in respect of religious matters. The consequence is that the obligatory display of the crucifix in elementary schools violates the principle of secularism, because it suggests that schools favour the religion of the majority. It is in fact conceivable that some pupils may interpret the display of the symbol of a religion to which they do not belong, as interfering with their beliefs, ‘and this may produce in their spiritual development and in their religious beliefs, the kind of consequences which the principle of state neutrality is precisely aimed to prevent.’⁴³

Citizens are not homogeneous; they hold different convictions, therefore the government does not treat them as equals if it favours one conviction on the ground that it is supported by the most numerous or powerful group.⁴⁴ To iden-

⁴³ Ibid.

⁴⁴ R. Dworkin, *A Matter of Principles* (Cambridge Mass, Harvard University Press 1985).

tify a state with the religious culture and civilisation of the majority, even in a highly homogeneous state, produces the exclusion of minorities and individuals belonging to other religions or cultures which must forcibly be represented by a symbol that is not in line with their identity and culture.

As a consequence of 9/11, and of the fact that in many European countries there is perceived to be an almost complete overlap between Islam and immigration, the victims of such exclusion and discrimination are increasingly the Muslim communities. Many surveys indicate that Muslims living in Europe are viewed with suspicion, as a fundamentalist and self-segregating group,⁴⁵ and are more vulnerable than any other minority to manifestations of prejudice and hatred in the form of anything from verbal threats to physical attacks on people and property, including action by public officials.⁴⁶ This new form of cultural racism is reflected in both the Italian as well as in the Bavarian case. In neither of them was

⁴⁵ The 2004 GfK Custom Research survey indicates that over 50% of Western Europeans view Muslims living in Europe today with suspicion. The 2005 Pew Survey presented a varied picture, with the majority of respondents stating that 'Muslims want to remain distinct' and that 'they have an increasing sense of Islamic identity'. Many Europeans are worried about 'Muslim fundamentalism'. One of the key findings of this survey is that, in a number of respects, Muslims are less inclined than Western Europeans to see a clash of civilisations and often associate positive attributes with Westerners – including tolerance, generosity, and respect for women. *See* 10 European Monitoring CTR. On Racism & Xenophobia, European Union, Muslims in the European Union: Discrimination and Xenophobia (2006), <www.fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf> visited 9 Jan. 2010.

⁴⁶ According to a 2006 report by the European Monitoring Centre on Racism and Xenophobia (EUMC), Muslims experience various levels of discrimination and marginalisation in all European countries – in employment, education and housing – and are also the victims of negative stereotyping by majority populations and the media. *See* The Annual Report on the Situation regarding Racism and Xenophobia in the Member States of the EU, EUMC 2006 <http://fra.europa.eu/fraWebsite/attachments/ar06p2_en.pdf>, visited 8 Dec. 2010. The European Council Committee Against Intolerance and Racism has adopted various Recommendations aimed at combating discrimination against Muslims. One of these refers explicitly to the consequences of the state of stress post 9/11, which has rendered the Muslim minority far more vulnerable to 'negative general attitudes, discriminatory acts, violence and harassment'. *See* European Comm'n Against Racism & Intolerance, Council of Europe, ECRI General Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism 4 (2004), <www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N8/recommendation_N°_8_eng.pdf>, visited 21 Dec. 2009. In July 2008, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, pointed out that the number of hate crimes has increased dramatically in Europe in recent years, and that, alongside traditional victims (Jews, Roma, and sexual minorities), such crimes are increasingly directed towards Muslims: 'A mixture of Islamophobia and racism is ... directed against immigrant Muslims or their children. This tendency has increased considerably after 9/11 and government responses to terrorist related crimes. Muslims have been physically attacked and mosques vandalised or burnt in a number of countries.' T. Hammarberg, Hate crimes – the ugly face of racism, anti-Semitism, anti-Gypsyism, Islamophobia and homophobia, <www.coe.int/t/commissioner/Viewpoints/080721_en.asp> visited 8 Jan. 2010.

the display of the crucifix challenged by Muslim parents. However, both judgments rely explicitly, *inter alia*, on a comparison between Christianity and Islam: the first, to be sure in a secularised form, is considered to be a structural component of Western democracy, while the latter is considered to represent values which are at odds with it. Moreover, Christianity, *unlike other religions*, is assumed to be naturally inclusive⁴⁷ and encompassing of the ideas of tolerance and freedom, which constitute the basis of a secular State. Accordingly, the display of the crucifix does not discriminate between Christians and non-Christians, because, as the Italian administrative judges state:

the mechanism of exclusion of infidels is common to all religions except Christianity, which considers faith in the omniscient secondary to charity, that is to say respect for others.

It follows that

the rejection by a Christian of those who do not believe implies the radical denial of Christianity itself, a substantial abjuration, which is not the case in other religions, where it may constitute a violation of an important prescription.⁴⁸

Which ‘other religions’ the judge refers to is no mystery as the judgment mentions ‘the problematic relationship between certain states and the *Islamic* religion.’⁴⁹ The Court also refers explicitly to the two principal preoccupations that cause Westerners sleeplessness after 9/11: the clash of civilisations and the threat of Islamic fundamentalism. According to the Court, globalisation and large-scale migration make it ‘indispensable to reaffirm, even symbolically, our identity’ (through the display of the crucifix), in order to ‘avoid a clash of civilisations’.⁵⁰ Moreover, the

⁴⁷ A similar belief in the universalistic nature of Christianity, but not of other religions, was recently expressed by US Supreme Court justice Antonin Scalia, during the oral argument in the case of *Salazar v. Buono* (*Ken L. Salazar et al. v. Frank Buono*, No. 08-472, 7 Oct. 2009, oral argument, p. 39). The case deals with the constitutionality under the First Amendment’s Establishment Clause of the display in the Mojave National Preserve of an eight-foot-high Christian cross, originally erected by the Veterans of Foreign Wars as a memorial to soldiers killed in military service. Justice Scalia defined as an ‘outrageous conclusion’ the observation made by the plaintiff’s attorney, that ‘the only war dead that that cross honors are the Christian war dead’. According to Scalia, ‘the cross is the most common symbol of the resting place of the dead’. ‘What would you have them erect? – Scalia asked the attorney, – A cross – some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?’ The attorney’s reaction (‘I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew’) apparently provoked a burst of laughter in the Courtroom.

⁴⁸ *TAR Veneto*, 17 March 2005, Decision n. 1110 *supra* n. 25 para. 13.3.

⁴⁹ *Ibid.*, para. 10.1.

⁵⁰ *Ibid.*, para. 12.6.

crucifix – which embodies the value of tolerance – must be displayed in public schools, in order to teach ‘*non-European* pupils ... to reject all forms of *fundamentalism*.’⁵¹ [emphasis added].

The Bavarian Court is even more outspoken. In order to mark the difference between ‘universal Christianity’ and ‘sectorial Islam’, the judgment explicitly draws the difference between the display of the crucifix – which is legitimate – and

cases in which the teacher through especially determined behavior – in particular through the wearing of attention-drawing clothing (Baghwan) – which unambiguously indicates a specific religious or philosophical conviction, impermissibly impairs the basic right to negative religious freedom of pupil and parent.⁵²

Five German *Länder* – Baden-Württemberg,⁵³ Saarland,⁵⁴ Hesse,⁵⁵ Bavaria,⁵⁶ and North Rhine-Westphalia⁵⁷ – have recently adopted regulations that draw on the same dichotomy, according to which Christianity is a structural element of the democratic system, whereas Islam represents values which are at odds with it. These laws prohibit public servants and specifically teachers from wearing Islamic symbols, but explicitly permit Christian ones. The law adopted in Baden-Württemberg on 1 April 2004 prohibits teachers from wearing Islamic symbols, but explicitly permit Christian ones. The law adopted in Baden-Württemberg on 1 April 2004 prohibits teachers from ‘exercis[ing] political, religious, ideological or similar manifestations’, particularly if they constitute ‘a demonstration against human dignity, non-discrimination’ However, the ‘exhibition of Christian and occidental educational and cultural values and traditions does not contradict’ such prohibition. Human Rights Watch interviewed officials from the Baden-Württemberg Ministry of Education, Youth and Sport, who confirmed that Christian clothing and display have been deliberately exempted by the legislature and that nuns’ habits, the cross, and the *kippah* are permitted.⁵⁸ The law

⁵¹ Ibid.

⁵² Bayerischer Verwaltungsgerichtshof [BayVGH] [Bavarian Higher Administrative Court] 3 June 1991, 122 Bayerische Verwaltungsblätter [BayVBl] 751 (751-54) (F.R.G.).

⁵³ *Gesetz zur Änderung des Schulgesetzes*, 1 April 2004, and *Gesetz zur Änderung des Kindergartengesetzes*, 14 Feb. 2006.

⁵⁴ *Gesetz Nr. 1555 zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland (Schulordnungsgesetz)*, 23 June 2004. In the explanation to the draft law, it is stated that the regulation is not limited to headscarves; however, the wearing of Christian and Jewish symbols remains possible.

⁵⁵ *Gesetz zur Sicherung der staatlichen Neutralität*, 18 Oct. 2004.

⁵⁶ *Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen*, 23 Nov. 2004.

⁵⁷ *Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen*, 13 June 2006.

⁵⁸ Human Rights Watch, *Discrimination in the Name of Neutrality Headscarf Bans for Teachers and Civil Servants in Germany*, p. 26 </www.hrw.org/publications//2009/Discrimination_in_the_Name_of_Neutrality.pdf>, visited 21 Dec. 2009.

adopted in Saarland affirms that the '[s]chool has to teach and educate pupils on the basis of Christian educational and cultural values', and that 'the task of education has to be fulfilled in such a manner that neither the neutrality of the country towards pupils or parents nor the political, religious or ideological peace of the school are endangered or disturbed by political, ideological or similar manifestations.' The Hessian law is even more explicit:

Public servants ... are not particularly allowed to wear or use any garments, symbols or other features that objectively may impair public confidence in their neutral tenure of office, or endanger the political, religious or ideological peace. On deciding if the requirement of sentence 1 and 2 are fulfilled the humanistically and in a Christian manner imbued occidental tradition of the Land of Hessen has to be taken into due account.⁵⁹

In Bavaria:

[T]eachers are not allowed to wear outer symbols ... that express a religious or ideological creed, in case students or parents understand these symbols ... as an expression of an attitude, that is not compatible with fundamental constitutional values and educational objectives of the constitution, including Christian-occidental educational and cultural values.⁶⁰

RELIGIOUS FREEDOM AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE DARK SIDE OF CONSENSUS

A large part of the success of the ECHR system is due to the commonalities amongst Western democracies regarding the philosophical foundations of human rights and the commitment to protect them. In other terms, consensus amongst state parties has been the primary condition as well as a major catalyst for the development of the world's most advanced regional system for protecting human rights. Consensus, however, has also been playing an important role in preventing the Court of Human Rights from developing into a fully fledged counter-majoritarian body.

The system of the Convention is based on the principle of subsidiarity, which dictates that while certain standards must be universally observed in all Contracting States, each of them is, in the first place, responsible for securing the rights and freedoms protected by the Convention. In order to reconcile the potential tension between universality and subsidiarity, the European Court has developed

⁵⁹ Art. 2, *Gesetz zur Sicherung der staatlichen Neutralität*, *supra* n. 55.

⁶⁰ Art. 59, *Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen*, *supra* n. 56.

the doctrine of the margin of appreciation. This doctrine, by granting Contracting States a certain margin to decide how to implement the Convention standards in a way that corresponds best to a state's domestic conditions, 'embraces an element of deference to decisions taken by [national] democratic institutions.'⁶¹

Not all of the rights protected by the Convention are subject to the same scope of the margin of application. In the words of the European Court, 'The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.'⁶² The Court applies rigid universal standards to some rights (e.g., the prohibition of torture) which are regarded as absolute. Other rights, however, are considered less homogeneously structured at the European level and in these cases the Court grants to the States a 'wide' margin of appreciation. Religious freedom has traditionally been one of such rights. Until 1993 the ECtHR never found a violation of Article 9 of the Convention and even after 1993, the Court has been rather conservative in its approach, often reinforcing the status of religious majorities to the detriment of the rights of those belonging to religious and ideological minorities.

Thus, the ECtHR had often legitimised the interference by States with certain rights, and in particular free speech, in order to protect the cultural/religious sensitivities of the (Christian) majority. The best-known example is *Otto Preminger Institute v. Austria*⁶³ where the Court stated that those who exercise freedom of expression relating to religious beliefs and opinions may have an obligation 'to avoid as far as possible expressions that are gratuitously offensive to others, and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.'⁶⁴ The ECtHR further specified:

[The Austrian courts found the objected-to film] to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public ... The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority on Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in the region ... [and did not] overstep[ped] their margin of appreciation⁶⁵

⁶¹ L. Wildhaber, 'A Constitutional Future for the ECHR?', 5-7 *Human Right Law Journal* (2002) p. 161 at p. 162.

⁶² ECtHR 28 Nov. 1984, Case No. 8777/79, *Rasmussen v. Denmark*, para. 40.

⁶³ ECtHR 20 Sept. 1994, Case No. 13470/87, *Otto Preminger Institute v. Austria*.

⁶⁴ *Id.* at para. 49.

⁶⁵ *Id.* at para. 36.

In numerous other cases,⁶⁶ the application of the doctrine of the margin of appreciation resulted in the protection of the collective religious and cultural freedom of the majority. Just as in the national courts judgments in the cases of the ‘Bavarian Crucifix Order’ and in the Italian crucifix case, the ECtHR’s balancing approach resulted in an extra guarantee of protection to cultural homogeneity and in a denial of rights to individuals belonging to ideological minorities.

The Court also relied on the doctrine of the margin of appreciation in *Dablab v. Switzerland*,⁶⁷ as it decided that prohibiting a woman from wearing a headscarf in the capacity of teacher at state schools did not amount to interference with her right to freedom of religion. On the contrary, according to the Court ‘in displaying a powerful religious attribute on the school premises ... the [Muslim] appellant may have interfered with the religious beliefs of her [presumably Christian] pupils.’⁶⁸ On that occasion, the Court also sanctioned a clear double standard, as it did not question the fact that ‘the principle of proportionality has led the cantonal government to allow teachers to wear discreet religious symbols at school, such as small pieces of jewellery’ [sic].⁶⁹ In short, it is now compatible with the Convention for teachers to wear ‘discreet’ crucifixes, but not ‘conspicuous’ veils.

In two cases decided on 4 December 2008 – *Dogru v. France*⁷⁰ and *Kervanci v. France*⁷¹ – the ECtHR decided that the expulsion of two veiled pupils from state schools did not violate the Convention. The Court noted that in France, the principle of secularism is fundamental and that States must be granted a wide margin of appreciation regarding the relationship between the State and religious denominations.

In contrast to the trend established in the Western European cases, the margin of appreciation has been applied by the Court in the Turkish veil case, *Sabin v. Turkey*,⁷² to legitimise the interference with the religious freedom of the majority. The Court considered the Turkish notion of secularism – which is shaped as a militant democracy clause and meant to protect the Kemalist regime *from Islam* – to be consistent with the values underpinning the Convention.⁷³ Thus, the Court accepted that, in protecting the principle of secularism, the State may impose certain limitations on individual rights. The Court observed that ‘the principle of secularism...is the paramount consideration underlying the ban on the wearing of religious symbols in universities’,⁷⁴ and accordingly

⁶⁶ ECtHR 24 May 1988, Case No. 10737/84 *Müller and Others v. Switzerland*.

⁶⁷ ECtHR 15 Jan. 2001, Case No. 42393/98, *Dablab v. Switzerland*.

⁶⁸ *Id.* (quoting the Federal Court of Switzerland).

⁶⁹ *Id.*

⁷⁰ ECtHR 4 Dec. 2008, Case No. 27058/05, *Dogru v. France*.

⁷¹ ECtHR 4 Dec. 2008, Case No. 31645/04, *Kervanci v. France*.

⁷² ECtHR, 29 June 2004, Case No. 44774/98, *Sabin v. Turkey*.

⁷³ *Id.* at para. 114.

⁷⁴ *Id.* at para. 116.

when examining the question of the Islamic scarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it ... Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need ... especially since ... this religious symbol has taken on political significance in Turkey in recent years.⁷⁵

The Court went on to stress that

democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must be based on dialogue⁷⁶

This led the Court to the conclusion that Turkey, in imposing the scarf ban, did not overstep its margin of appreciation.⁷⁷

It is curious that the Court used the margin of appreciation doctrine to protect *minorities* when the majority religion happens to be Islam. If we read this together with the legitimisation of Turkey's militant anti-Islamic notion of secularism and with the statement in *Dabab* that the veil cannot be reconciled with certain fundamental principles, the Court seems to imply a degree of incompatibility between Islam and liberal democracy. In contrast all the cases, such as *Otto Preminger*, in which the Court protected the sensibilities of mainstream Christianity, suggest that the latter is fully compatible with democracy and with the values that underlie the Convention. In sum, Christianity and Christian values have been defended even at the expense of trampling on fundamental individual freedoms, because the ECtHR did 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, has been restrictively regulated on the ground that it threatens the democratic basis of the State.

⁷⁵ *Id.* at para. 115. In this context, the Court recalled its statement in *Dablab v. Switzerland* that the wearing of a headscarf represents a 'powerful external symbol' and that it may be questioned whether it 'might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.' *Sabin*, para. 111.

⁷⁶ *Id.* at para. 108.

⁷⁷ *Id.* at para. 122.

THE LAUTSI DECISION: THE EUROPEAN COURT AS A GUARDIAN AGAINST THE TYRANNY OF MAJORITIES

With the *Lautsi* decision, however, the Court seems to make a remarkable shift. In *Lautsi*, the margin of appreciation is mentioned in three occasions, but always by the Italian government in the hope of avoiding any kind of substantive supervision by the Court. This is not to say that ECtHR in *Lautsi* did not take into account the domestic context. On the contrary, the case analyses the history of the mandatory display of the crucifix in state schools, in the context of the relationship between the Italian State and the church, and it cites all the relevant Constitutional Court case-law. The ECtHR underlines that the Italian Constitutional Court has explicitly stated that the confessional system has come to an end with the amendment of the Lateran Treaty in 1985 (para. 25). Since the mandatory display of the crucifix is based on acts dating back to 1924 and 1928, the Strasbourg Court considers this obligation as the heritage of a sectarian conception of the state, which clashes with the duty of a secular state and with the rights of the Convention (para. 30). The European Court also stresses that Protocol 1 should be interpreted in the light of the provisions of the Convention, in particular Articles 8, 9 and 10 (para. 47A). Accordingly, the purpose of the Protocol is to ensure pluralism in the sphere of education, which is essential to the preservation of a democratic society. This goal is achieved primarily through public education (para. 47B). The beliefs of parents can in fact be respected only in the context of a school environment that is open, welcoming and inclusive, regardless of the social backgrounds of the pupils, of their ethnic origin and religious beliefs. According to the Court, schools should be welcoming of different religions and philosophical convictions, so that schoolchildren can learn about different ideas and traditions (para. 47C). In the field of education, only state neutrality guarantees pluralism. Hence, the state is obliged to refrain from imposing, even indirectly, certain beliefs in situations where individuals depend on the state or in contexts in which they are particularly vulnerable. The case of schoolchildren is a particularly sensitive one, because here the constraining state power is imposed on individuals who are not yet equipped with sufficient critical capacity to be able to distance themselves from the message that comes from a preferential choice expressed by the state in religious matters (para. 47, 48).

The Court also meticulously reconstructs the (frankly suicidal) position of the Italian government, which founded the legitimacy of the display of the crucifix on two mutually exclusive arguments. The first draws on the decisions by the two administrative courts discussed above: the crucifix has a cultural significance and represents constitutional values, national identity, historical heritage and the principle of secularism (para. 34, 35 and 40). The second argument is that the mandatory display of the crucifix was needed to achieve a political compromise with the

Catholic parties, which represent large sectors of the Italian population and reflect their religious beliefs (para. 42).

The European Court did not buy this construction, which relies on the 'confessional' or 'post-secular' reading of the principle of secularism to which I referred above. Quoting the *Karaduman v. Turkey* decision, the Court stated that in those contexts where the majority belongs to a particular religion, not all manifestations of the latter are acceptable since they may constitute a form of pressure on those who do not belong (para. 50). And as the crucifix, despite the Byzantine arguments of the Italian government, can reasonably be interpreted as a religious symbol, its display may disturb the consciences of those who do not belong to Catholicism (para. 55). Since the purpose of public education is to develop in children the ability to think critically, in this context the state is obliged to comply with the principle of denominational neutrality (para. 56).

The Court therefore does not see how the exposure of a symbol that can reasonably be associated with Catholicism (the majority religion in Italy) will support the educational diversity that is essential to the preservation of a democratic society, as it is assumed by the European Convention and recognised by the Constitutional Court in domestic law (para. 56).

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 European Court finally embraced a veritably counter-majoritarian role. The Council of Europe's system for protecting human rights was established precisely to correct some of the major deficiencies of majoritarian democracy. As the Italian crucifix case shows, domestic mechanisms may not always be able perform such a task, as the majority culture and sensibility often end up prevailing.⁷⁸ Compared to national courts, however, international ones are in this sense in a position of considerable advantage, being less (or not at all) captive to the interests and the prejudices of national majorities. 'To grant a margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect ... minorities',⁷⁹ which are already disadvantaged by the very logic of majority democracy.

As has been convincingly pointed out, the doctrine of the margin of appreciation derives its justification primarily from the 19th century theories of state consensus, and in relying on it, the European Court shows deference to the principle of state sovereignty. To impose new duties stemming from the Convention,

⁷⁸ E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', 31 *International Law and Politics* (1999) p. 843 at p. 850.

⁷⁹ *Id.*

it has no other method than to rely on consensus, thus avoiding taking direct responsibility for its decisions. In widely applying the doctrine of margin of appreciation, the Court, undermines its role of the external guardian against the tyranny of the majority.⁸⁰

Constitutionalism-related principles and institutions, including specifically the protection of fundamental rights, find their *raison d'être* in the existence of a *de facto* pluralistic polity, i.e., a polity characterised by the co-existence of different religious, cultural, ideological and philosophical conceptions. If a polity is completely homogenous because all its members share the same conception of the good, constitutionalism and the institutions in which it takes shape are not necessary. No European polity, however, is completely homogeneous. European polities, just like all post modern ones, 'cover a broad spectrum that extends from nearly homogeneous polities to polities that are so utterly divided along normative lines that there appears to be no common ground whatsoever between the various warring factions.'⁸¹ Now one can argue that the Italian polity falls into the category of nearly homogeneous polities, characterised by strong cohesion on religious values. This does not mean, however, that individuals and groups within Italy that hold different religious, ideological, and philosophical conceptions do not merit protection. On the contrary, precisely because of its highly homogeneous religious composition, counter-majoritarian devices that protect minorities from the abuses of the majoritarian logic are of crucial importance. The doctrine of the margin of appreciation in its maximalist application thwarts the effectiveness of such devices and turns European supervision into uncritical adherence to majority decisions.

The novelty of the *Lautsi* decision is therefore to be found in the Court overcoming its previous ultra-cautious position of traditional deference to states in the sphere of religious freedom. Said differently, *Lautsi* could be an important step forward in taking minority rights seriously, even when this requires a rethinking of traditional domestic equilibria.

At the same time, the application of the margin of appreciation doctrine, had so far protected the ECtHR from direct confrontations with Contracting Parties. The vituperative criticism directed at the European judges in the aftermath of the *Lautsi* decision indicates that a more active European Court will not automatically be welcomed by the European peoples. The collective reputation of a court depends, to a large extent, on the audience at which its opinions are aimed.⁸² Judicial

⁸⁰ *Id.* at p. 852.

⁸¹ M. Rosenfeld, *Just Interpretations. Law Between Ethics and Politics* (Berkeley Los Angeles London, California University Press 1998) p. 2.

⁸² R.K. Newman, 'The Warren Court and American Politics: An Impressionistic Appreciation', 18 *Constitutional Commentary* (2001) p. 681.

authority ultimately depends on the confidence of citizens. If a court's interpretations deeply differ from the convictions of the people, the people will start resisting judicial decisions.⁸³

In its past case-law regarding religious freedom, the Court has often put forward fundamental principles, declared and explained public values, rules transcending individual controversies and connected to the conditions of social and political life.⁸⁴ Thus, the ECtHR was speaking the language of a court pursuing public actions. In *Sabin*, for example,

the Court has frequently emphasised the State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considered that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.⁸⁵

Unfortunately, there has been virtually no consistency between such utterances and the actual decisions taken.⁸⁶ On the contrary, the Court had always decided according to a dispute resolution model, performing the traditional role of courts as conflict resolution agents, invested with the authority to decide over specific questions between clearly identified parties.

If the European Court, as the *Lautsi* case might suggest, abandons its traditional judicial self-restraint and becomes a true arbiter in highly divisive issues, such as religion, it will face many challenges. A crucial one will be to gain the confidence of European citizens, in order to avoid provoking populist resentments when establishing rights in a context of cultural controversy.



⁸³ R.C. Post & R.B. Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash', 42 *Harvard Civil Rights-Civil Liberties Law Review* (2007) p. 373, who refer however to the American experience.

⁸⁴ On the differences between courts pursuing public actions and courts acting as dispute resolution agents, see P.M. Bator et al., *Hart and Wechsler's Federal Courts and Federal System*, 3rd edn. (Westbury, NY, Foundation Press 1998) p. 79 et seq.

⁸⁵ *Sabin v. Turkey*, *supra* n. 72, para. 107.

⁸⁶ I. Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer', 6 *Cardozo Law Review* (2009) p. 2669 at p. 2696.