



**EUROPEAN COURT OF HUMAN RIGHTS**

**Grand Chamber**

**Written Observations**

**CASE OF LAUTSI V. ITALY**

**(Application No. 30814/06)**

**Submitted by**  
**the *European Centre for Law and Justice***  
**Jointly with 79 Members of Parliament of various European countries**  
**Acting as third parties**

**Strasbourg, 1 June 2010**

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## Summary

Application No. 30814/06 asks a straightforward, precise question that calls for a clear answer – have the rights invoked by the applicant been violated by the fact of the mere presence of a crucifix in classrooms?

The answer to this question has to be negative, because:

- the *forum externum* of the applicants' children has not been violated since they have not been forced to act against their consciences or prevented from acting in accordance with their consciences;
- the *forum internum* of the children and the applicant's right to bring them up in accordance with her philosophical convictions have not been violated since the children have not been forced to believe or prevented from believing; they have not been indoctrinated and have not suffered misplaced proselytising.

Application No. 30814/06 does not raise the following general question: Does the State's desire to put crucifixes in classrooms comply with the Convention?

The error in the judgment of 03 November was to suppose that the answer to the first question implied an answer to the second question. Yet a negative answer to the second question as returned by the Court was tantamount to creating a new obligation, concerning not the applicant's rights but the nature of the "educational environment".

It is because the Court has been unable to establish seriously that the *forum internum* or the *forum externum* have been violated by the fact of a crucifix being present in the classroom that it has created a new obligation of the total secularisation of the educational environment. By adopting this approach, the Court has exceeded its remit in respect of the application submitted to it and in respect of its ability to create new obligations with which States are required to comply.

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## Introduction

Have the pupil's religious freedom and respect for the parents' convictions in relation to their children's education been violated by the presence of a crucifix in the classroom?

To answer this question with the necessary precision, we would recall firstly the fundamental distinctions that allow qualification of the various forms of infringement of freedom of religion and conscience (*forum internum* / *forum externum*, positive freedom / negative freedom).

Having noted that the presence of a crucifix did not violate the *forum externum* of the pupils, since it neither forced them to act against their convictions nor prevented them from acting in accordance with their convictions, we shall determine whether the presence of a crucifix is likely to violate their *forum internum*. To do so, we shall compare the potential impact of the

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crucifix on the innermost conscience of the pupils in the light of the criteria that qualify an act as indoctrination or misplaced proselytising; since indoctrination and proselytising are the two concepts developed by the Court to protect the *forum internum*, more particularly in the educational context and specifically in the light of parents' rights. We shall note at that point, on the basis of the criteria actually applied by the Court, that the potential impact of the crucifix is neither sufficiently certain or powerful to be likely to be qualified as such.

We will then be able to conclude that the presence of the crucifix, even if it is made compulsory:

- does not violate their *forum externum*, since:

it does not oblige the pupils to act against their consciences,

it does not prevent them from acting in accordance with their consciences;

- does not violate the pupils' *forum internum* or the parents' rights, since:

it cannot be qualified as indoctrination,

it cannot be qualified as misplaced proselytising.

This is obvious and totally in keeping with well-established case-law at the Court. The Second Section should have been able to reach the straightforward finding of the substantial non-violation of the applicant's rights and judged accordingly.

This was not the case, however, as the Second Section went beyond the application submitted to it and amended it. Instead of the original question of whether the applicant's rights had been violated by the presence of the crucifix, the Court substituted the following question "Is the presence of the crucifix in itself compatible with the idea that (part of) the Court has of what the school environment should be?"

Obviously, the Section answered "no" to this second question. That is why the Court concluded retrospectively from this alleged incompatibility of the presence of the crucifix with what the school environment should be that the applicants' "rights" must have been violated. Since the violation of rights was deduced not from facts but from the theory elaborated by the Court, the harm noted by the Court is also theoretical. Where violation is theoretical, harm is also theoretical; there had to be some harm, and the Court could find nothing better than potential emotional disturbance. This is an ingenious bit of wangling – even an attentive reader ceases to know which rights or obligations are at issue; the only point to be retained, roughly and briefly, is that it is not right to have a crucifix in a classroom!

Analysis of the Lautsi case ends here.

In a second part, although it is absolutely pointless in the present case, but notwithstanding in order to respond to all the developments in the judgment of 03 November, we shall attempt to determine whether the Court could have any legal foundation for answering the second question as it did, enabling it to judge that the presence of the crucifix in itself was contrary what the school environment should be.

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To analyse this point, it is enlightening to ask the same question in the following fashion: "Have the former Communist countries violated the Convention by hanging icons and crucifixes on walls in their schools once more?" The question then becomes, "Is the Court able to find in the Convention a legal foundation that allows a restriction of the States' freedom in this matter?"

It is immediately obvious that the text of the Convention does not furnish any such foundation – the Convention is indifferent in this respect. Thus only a new obligation, elaborated by case-law, would be able to conclude that the hanging or removal of a crucifix constitutes a *de facto* violation.

In its judgment of 03 November the Court wanted to create such a new obligation – an obligation to secularise the educational environment. This creation has been effected on the basis of and by a new interpretation of the case-law notions of "neutrality and impartiality" and "promotion of diversity and tolerance". The judicial creation of a new obligation is not bad in itself, but it must obey a number of rules, particularly rules involving political prudence and legal coherence, which has not been the case here. Indeed not only is it not possible to deduce the obligation of secularisation from either the Convention or national law, but moreover it infringes and contradicts the very Convention and its underlying values.

In conclusion, it has to be said that the judgment delivered in November has taken the Court not only beyond the application submitted to it but also beyond the Convention – and hence beyond the law – and into the realms of politics and ideology. That is why the judgment has left jurists perplexed and is being contested by politicians.

We shall now look at this in greater detail.

**I. The pupil's freedom of conscience and the parents' right to have their children brought up respecting their convictions are not violated by the presence of a crucifix in the classroom**

Freedom of conscience may be violated in two ways – either in terms of the *forum internum* (A), or in terms of the *forum externum* (B). This area is covered by Article 2 of Protocol No. 1 in conjunction with Article 9. It is only if the presence of a crucifix were to have an effect on the religious beliefs of pupils or obliged them to participate against their will in clearly religious activities that such presence would be incompatible with Article 2 of Protocol No. 1 taken in conjunction with Article 9.<sup>1</sup>

**A. The presence of a crucifix does not violate the *forum externum*, i.e. the freedom to manifest one's beliefs, either positively or negatively (Art. 2, Protocol No. 1 - Art. 9 (2)).**

Protection of the *forum externum* addresses the positive or negative manifestation of convictions; it is guaranteed in Article 9 (2) of the European Convention on Human Rights. Pressure is exerted on the *forum externum* when it is subjected to a *co-action* forcing the manifestation, both public and private, of a person's religion or convictions. This co-action may be positive, obliging a person to act against their convictions, or negative, when a person

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<sup>1</sup> ECHR, [GC], 29 June 2007, *Folgerø and others v. Norway*, para. 98; ECHR, 9 October 2007, *Hasan and Eylem Zengin v. Turkey*, para. 76.

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is prevented from acting in compliance with his/her convictions. Article 9 (2) lists the four specific forms of manifestation that are guaranteed: worship, teaching, practice and observance. As Malcolm Evans indicates, applicants must generally provide proof of the hindrance of their ability to take part in one of these activities when they claim that their freedom to manifest their religion or conviction has been violated<sup>2</sup>.

**1. The presence of a crucifix does not prevent anyone from behaving in accordance with their beliefs; in other words, it does not violate the freedom to manifest one's beliefs positively.**

Cases involving the Islamic veil are the most frequent examples of people considering themselves to be prevented, in an educational context, from acting in accordance with their beliefs. The ban on wearing the Islamic veil constitutes a manifest infringement of the freedom to manifest one's beliefs positively, although the Court holds that it is compatible with the Convention.

Among the Court's judgments<sup>3</sup>, the judgment in the case of *Dahlab v. Switzerland*<sup>4</sup> constitutes the benchmark case-law on the subject, and on which the judgment of 03 November claims to be based. In this case, the Court held that the ban on wearing the veil came within the scope of the national margin for appreciation, and was compatible with the Convention. The Court found that the desire of the Swiss authorities to ensure neutrality in public-sector education and to protect the religious feelings of the pupils constituted legitimate interests justifying a ban on wearing the veil. To appreciate the proportionality of this interference in relation to the interest being pursued, the Court noted firstly the young age of the children and secondly the apparent difficulty in reconciling the wearing of an Islamic scarf with the message of tolerance, respect for others, and above all equality and non-discrimination that, in a democracy, all teachers should transmit to their pupils. We are able to subscribe to this judgment.

However, it would be wrong to transpose this solution to the Lautsi case, for the following two reasons:

- in the Lautsi case, no-one is being prevented from doing or forced to do anything;
- the fact that the banning of a religious symbol is compatible with the Convention does not mean that its authorisation is contrary to the Convention. The possibility of prohibiting something does not create an obligation to do so. States that do not prohibit the wearing of religious symbols in schools are not violating the Convention.

It therefore cannot be deduced from the Court's case-law on the veil that not removing crucifixes from classrooms violates the Convention.

**2. The presence of a crucifix does not oblige anyone to act against their beliefs; in other words it does not violate the freedom to manifest one's beliefs in a negative fashion.**

The other hypothesis of violation of the freedom to manifest one's convictions addresses the obligation to act against one's convictions. The Court has abundant case-law on this point. In the case of *Valsamis v. Greece*, the Court found that Greece had acted lawfully in obliging (on pain of temporary exclusion) young Jehovah's Witnesses to take part in a school parade organised as part of the commemorations for the national holiday, which also included mass and a military parade. The Court found that this obligation did not prevent parents from

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<sup>2</sup> Malcolm Evans, *Manual on the wearing of religious symbols in public areas*, published by the Council of Europe, Strasbourg, 2009, p 12.

<sup>3</sup> See also ECHR, 29 June 2004, no. 44774/98, *Sahin v. Turkey*.

<sup>4</sup> ECHR, 15 February 2001, 42393/98, *Lucia Dahlab v. Switzerland*.

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carrying out their educational duties by advising their children<sup>5</sup>, and that furthermore it was not for the European judge to seek and indicate the educational methods that were most suited to the aim being pursued of protecting historic memory among the rising generation<sup>6</sup>.

Here again, this is not applicable in the present case. Contrary to the Valsamis case where the pupils were obliged to take part in a parade, in the Lautsi case there is no obligation to take action. The pupils are not obliged to follow any religious education<sup>7</sup>, or to swear an oath<sup>8</sup>. The pupils are neither *forced* nor obliged to do anything; they are not even *invited* to make the slightest gesture or adopt any attitude.

The facts submitted to the Court for examination do not indicate any co-action; there is no violation of anyone's *forum externum*, there is no restriction placed on the freedom to *manifest* one's religion. There is therefore no point, at this stage on the reasoning, to consider whether hanging up a crucifix is "provided for by law" and "necessary in a democratic society". It therefore cannot be deduced from this that not removing the crucifixes from classrooms infringes the freedom to manifest one's beliefs. Let us now move on to analysis of the *forum internum*, which will enable us to take a closer look at respect for the parents' rights.

**B. The presence of a crucifix does not violate the *forum internum*, i.e. the protection of personal conscience (Art. 2, Protocol No. 1, Art. 9 (1)).**

The Convention protects *personal convictions* in Article 9 (1). The second sentence of Article 2 of Protocol No. 1 also protects the personal convictions of pupils by sanctioning indoctrination. For applicants to be able to claim to be the victim of violation of their *forum internum*, they must be able to demonstrate that the presence of a crucifix has an *indoctrinating* effect and/or a *misplaced proselytising* effect. The question that arises is therefore the following: *Is the presence of a crucifix an attempt to persuade or force individuals to abandon their convictions*<sup>9</sup>?

**1. The presence of a crucifix is not intended to indoctrinate and does not have that effect**

In order to establish that the presence of a crucifix is not intended as and does not have the effect of indoctrination, it is necessary to check that:

- the presence of a crucifix does not have the effect of imparting information or knowledge by means of teaching or education, that it is not likely to persuade or even to attempt to persuade the pupils to alter their convictions;
- the impact of the presence of a crucifix is minimal;
- such presence in no way limits or hampers the ability of parents to exercise their authority and influence in terms of upbringing and convictions.<sup>10</sup>

a) The presence of a crucifix does not have the effect of imparting information or knowledge by means of teaching or education, that it is not likely to persuade or even to attempt to persuade the pupils to alter their convictions

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<sup>5</sup> ECHR, 18 December 1996, *Valsamis v. Greece and Efstratiou v. Greece*, para. 31, 32 and 33.

<sup>6</sup> *Idem*.

<sup>7</sup> ECHR, [GC], 29 June 2007, *Folgerø and others v. Norway*, *cit.*; see also ECHR, 9 October 2007, *Hasan and Eylem Zengin v. Turkey*, *cit.*

<sup>8</sup> ECHR, [GC], 18 February 1999, *Buscarini and others v. San Marino*.

<sup>9</sup> M. Evans, *op.cit.*, p.18.

<sup>10</sup> ECHR *Valsamis v. Greece* para. 31-32; *Efstratiou v. Greece*, 32-33; *Kjeldsen, Busk Madsen and Pedersen* para. 54.

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We should note firstly that the presence of a crucifix cannot be assimilated to school syllabuses and activities, which are generally the only things addressed by Court rules on indoctrination. Nevertheless, even by assimilating by extension the presence of a crucifix to a component part of the syllabus, it is clearly apparent that this presence cannot be qualified as indoctrination.

Italy would be deemed to be aiming at indoctrination if the hanging up of a crucifix was aimed at advocating a specific type of behaviour<sup>11</sup> that went beyond the framework of teaching and education; this did not apply in the present case. The mere presence of a crucifix did not advocate any type of behaviour.

As Malcolm Evans notes, Article 2 does *not* mean that a State is legally required to propose an educational system in agreement with the parents' convictions. He establishes nevertheless that parents may express objections concerning the nature and the substance of the education and teaching received by their children.<sup>12</sup> Thus, Article 2 of the Additional Protocol does not guarantee parents the absolute right to the education of their children being provided by the State in accordance with their convictions, but only the right to *respect* for those convictions<sup>13</sup>. The Court felt that Article 2 of Protocol No. 1 prohibited States pursuing any purpose of indoctrination that might be considered as not respecting the religious and philosophical convictions of parents. That was the limit that may not be exceeded.<sup>14</sup>

In this respect it was for the State to ensure that the information or knowledge included on the syllabus should be taught in an objective, critical and pluralist fashion<sup>15</sup>, enabling pupils to develop their critical faculties in respect of religions matters in a calm environment, away from any misplaced proselytising<sup>16</sup>. It is not contested that the information of knowledge included on Italian school syllabuses, on which the Court is not required to pronounce and which may legitimately vary in different countries and at different periods in time<sup>17</sup>, should be passed on in an objective, critical and pluralist fashion. Observance of the objective, critical and pluralist nature of teaching does not go so far as to "prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind", and does not permit parents to object to this, "otherwise all institutionalised teaching would run the risk of proving impracticable".<sup>18</sup>

b) The impact of the presence of a crucifix is minimal

It is the impossibility of proving indoctrination resulting from the mere presence of a crucifix that led the Court, in its judgment in November, to invent the notion of "emotional disturbance" which would prove that the crucifix had an impact on the children. This "damage" is purely putative and hypothetical, and presupposes considering that the presence of a religious symbol in the school environment is illegitimate on principle.

According to the Second Section, this damage is constituted by the *possibility of the exertion*

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<sup>11</sup> ECHR, *Kjeldsen and others*, para. 53.

<sup>12</sup> M. Evans, *op.cit.*, p.25.

<sup>13</sup> ECHR, *Family H; W. and D.M., M and H.L. v. United Kingdom; Graeme v. United Kingdom*.

<sup>14</sup> ECHR, *Kjeldsen and others*, para. 54.

<sup>15</sup> ECHR, *Kjeldsen and others*, para. 53.

<sup>16</sup> ECHR, *Hasan and Eylem Zengin*, para. 52.

<sup>17</sup> ECHR, *Valsamis*, para. 28.

<sup>18</sup> ECHR, *Kjeldsen and others*, para. 53.

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*of pressure* of a psycho-social nature<sup>19</sup>. Stating that the presence of a crucifix may easily be interpreted by pupils of all ages as a religious sign and that they would feel that they were being educated in a school environment that was marked by a given religion is not sufficient to establish the existence of pressure such as to:

- change the convictions of the Lautsi children,
- fail to respect the convictions of their mother, or
- hinder the ability of their mother to exercise her authority and influence in terms of upbringing and convictions.

Since the ability to interpret a sign means that people could feel that they were in a marked environment is more than insufficient to qualify a violation of the *forum internum* of the pupils and of the ability of their parents to exercise their influence in respect of convictions.

**In the protection of convictions, there is no “entitlement to a healthy environment”, to an environment not polluted by national culture and superstition.** In this respect, efforts to make the school environment healthier would have to include changing holiday dates in order to avoid any connection with a given religion, which could reasonably be associated with Roman Catholicism (the majority religion in Italy) (cf. §56).

**Similarly, in the religious context, there is no right to not be “emotionally disturbed”<sup>20</sup>.** On the contrary, the prime object of the Court is to guarantee the free expression of convictions and opinions, even if these may disturb or shock. The presence of a crucifix, which may conceivably in exceptional cases *risk emotionally disturbing* a pupil, does not violate the pupil’s *forum internum* or the parents’ right to bring up their children in accordance with their convictions. Some history or sex education classes are much more likely to emotionally disturb the pupils and conflict with parents’ convictions, but the Court has not found that such emotional disturbance could be the sign of a violation of the parents’ rights. The only obligation incumbent on the authorities is to ensure that parents’ convictions are not offended at this level by imprudence, lack of discernment, or misplaced proselytising<sup>21</sup>. This obligation is minimal since, according to the Court, parents retain the possibility of turning to private establishments or of teaching the children at home, or of having them taught at home, unless the children are subjected to sacrifices and inconvenience as a result of resorting to one of these alternatives.<sup>22</sup>

The minimal nature of this obligation is also justified because of the essentially relative nature of negative freedom, which depends on each person’s subjective appreciation: one person may be offended by words, a caricature or a symbol, whereas others may not be. This is why it is important to ensure that respect for negative freedom does not obstruct the positive exercise of the right in question. Even French administrative case-law from the early 20<sup>th</sup> century has always looked to ensure this<sup>23</sup>. This is still an important and sensitive issue today, particularly in connection with freedom of expression in religious matters. Confirming the approach adopted by the Section in November would have the Court take a solemn step – and one that would be difficult to reverse – towards the concept of the “defamation of religions”<sup>24</sup>.

Moreover, there is no doubt that the impact of removing the crucifix would be considerable

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<sup>19</sup> “Indeed, in countries where the vast majority of the population follows a given religion, the manifestation of the rites and symbols of that religion with no restriction as to place or form may constitute pressure on those pupils who do not practice that religion or on those who follow a different religion.” (para. 50)

<sup>20</sup> ECHR, 5 March 1991, 17439/90, *Choudhury v. United Kingdom*.

<sup>21</sup> ECHR, *Kjeldsen and others*, para. 54.

<sup>22</sup> *Idem*.

<sup>23</sup> See Gabriel Le Bras, “Le Conseil d’État régulateur de la vie paroissiale” [the Conseil d’État as regulator of parish life], *Études and Documents du Conseil d’État* [Conseil d’État studies and documents], no. 4, 1950.

<sup>24</sup> See ECLJ, “Combating Defamation of Religions, Submission to the UN Office of the High Commissioner of Human Rights”, June 2008. Published on ECLJ’s site at <http://www.eclj.org/>.

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and experienced by the vast majority of the population as an unbearable form of intolerance.

*In fine*, the presence of a crucifix cannot be assimilated to *education*; the Convention offers no protection from the exceptional risk of being “*disturbed*”, and there is no “right to an environment” in religious matters. The Court therefore cannot find that the applicant's rights have been violated because of the presence of a crucifix.

- c) Such presence in no way limits or hampers the ability of parents to exercise their authority and influence in terms of upbringing and convictions

The State must respect the natural right, firstly, of parents to ensure the upbringing and education of their children; it is a right and a natural duty that is incumbent on them as a priority<sup>25</sup>. Where the State assumes the function of education and instruction, it therefore does so in a subsidiary capacity, and that is why it must respect the convictions of parents. For a proper understanding of the relationship between the State and parents in terms of education, it is important to bear in mind that the family-based society is not in opposition to the nation-based society, but forms an integral part of it in a natural relationship of interdependence. Consequently, the State must respect, recognise and take into account<sup>26</sup> the convictions of parents, not only as a relatively negative undertaking but also as a certain positive obligation<sup>27</sup>. Although this obligation of respect is first and foremost incumbent on the State, the family is also required to make a certain positive effort to display respect and tolerance for society, even if the effort made is only minimal.

Thus the Article in the Protocol is right to guarantee parents not the absolute right to provide their children's education in conformity with their convictions, but the right to respect for those convictions<sup>28</sup>. Thus the attitude the State should adopt would be to ensure that there was no effect on the parents' right to enlighten and advise their children, and to exercise their natural function as their children's educators, guiding them in a direction in conformity with their own religious or philosophical convictions<sup>29</sup>.

In a number of cases, involving specific infringements of the actual substance of these rights, more particularly with regard to compulsory education, the Court has found that such infringements were not sufficiently important to hinder the parents' rights. *A fortiori*, the presence in the classroom of an object the applicant finds unpleasant could not be said to have such an effect.

**2. Can the fact of granting a privileged place to the majority religion constitute a form of "misplaced proselytising"?**

In the cases involving the veil, the Court held that the visible wearing by a teacher of a sign of belonging to a particular religious group might – under certain conditions – be prohibited by the State without infringing the Convention. The fact more particularly that the wearing of a religious sign may be the means of “misplaced proselytising”<sup>30</sup> is one of the reasons that might render this ban legitimate in the Court's eyes.

In accordance with its constant practice, the Court, in distinguishing between “good

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<sup>25</sup> ECHR, *Kjeldsen and others*, para. 52.

<sup>26</sup> ECHR, *Campbell and Cosans*, para. 36.

<sup>27</sup> ECHR, 9 October 2007, *Hasan and Eylem Zengin v. Turkey*, para. 49.

<sup>28</sup> EHR Comm., *Family H.* - ECHR, 5 February 1990, *Graeme v. United Kingdom*: DR 64, p.158.

<sup>29</sup> ECHR, 25 May 2000, *A. J. Alonso and P. Merino v. Spain*; ECHR, *Kjeldsen and others*, para. 54.

<sup>30</sup> ECHR, *Hasan and Eylem Zengin*, para. 52.

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proselytising” and “bad proselytising”<sup>31</sup>, appreciated the circumstances of the case. Thus in the *Dahlab* and *Sahin* cases, the Court reached its judgment on the message signified by the sign. It is because the Court found it was scarcely compatible with the message of tolerance, respect for others and above all equality and non-discrimination that in a democracy all teachers should transmit to their pupils that it found the ban acceptable. According to the Court, a State may legitimately limit religious proselytising where it is misplaced and takes reprehensible forms, such as corruption or deformation, and uses offers of material or social advantage, abusive pressure, or brainwashing to obtain a change of religion and, consequently, does not comply with the respect due to freedom of another’s thought, conscience and religion<sup>32,33</sup>.

Once again, it should be borne in mind that this case-law cannot be applied directly to the *Lautsi* case, as it is not possible to deduce an obligation to prohibit from the possibility of prohibiting. Nevertheless, it is important to note that the presence of a crucifix does not fall within the scope of misplaced proselytising. This appears very clearly from reading through the Court’s case-law on the privileges enjoyed by majority religions. It is obvious that the presence of a crucifix in schools falls much more within this frame of reference than within that of proselytising.

Thus the Court found that the constitutional arrangements in Norway imposing the compulsory teaching of a subject devoted mainly to the State religion did not contravene the Convention, since “the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court’s opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (see, *mutatis mutandis*, *Angelini v. Sweden* (dec.), no 1041/83, 51 DR)”. (§ 84 [sic]).

As the Court noted in the *Folgerø* case<sup>34</sup>, the presence of religion in teaching contributes to understanding, respect and dialogue among persons of different beliefs and convictions and constitutes an appropriate means of combating fanaticism<sup>35</sup>. While this applies to preventing religious fanaticism, it also applies to preventing anti-religious fanaticism. Indeed, the second sentence of Article 2 of Protocol No. 1 in no way covers a right for parents to leave their children ignorant in terms of religion and philosophy<sup>36</sup>.

Similarly, in its judgment in the case of *Hasan and Eyleme Zengin v. Turkey*, the Court held that the fact that in Turkish schools the syllabus in primary and lower secondary schools and all the textbooks compiled in compliance with instructions from the Ministry of Education gave a more prominent place to knowledge of Islam than to knowledge of other religions and philosophies could not *per se* be considered failure to observe the principles of diversity and objectivity that could be analysed as constituting indoctrination, given that the Muslim faith was the majority religion practised in Turkey, although the State itself was secular.

It is true that the crucifix occupies a privileged place in Italian schools compared with the symbols of other religions, but this situation is not unfair given the fact that the Roman Catholic religion is the majority religion practised in Italy, despite the secular nature of the Italian State. Furthermore, as the Court found in the *Folgerø* case, “in view of the place occupied by Christianity in the national history and tradition of the respondent State, this must

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<sup>31</sup> ECHR, 24 February 1998, *Larissis and others v. Greece*, para. 54 and 59. See Michel Levinet, “ConvEDH”, *JCP Europe Traité*, fasc. 6522, para. 64.

<sup>32</sup> ECHR, 25 May 1993, 14307/88, *Kokkinakis v. Greece*, para. 48.

<sup>33</sup> Quoted by Michel Levinet, “ConvEDH”, *JCP Europe Traité*, fasc. 6522, para. 64.

<sup>34</sup> ECHR, *Folgerø and others*, para. 88 and 89.

<sup>35</sup> ECHR, *Zengin*, para. 59.

<sup>36</sup> ECHR, *Folgerø and others*, para. 89.

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be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum”.

In conclusion, neither the Convention nor its interpretation permits a judgment that the presence of a crucifix violates the rights invoked by the applicant. If no reason is to be found therein, Italy cannot be held to be obliged to remove the crucifixes.

**The strict analysis of the application submitted to the Court for examination ends here.**

It is obvious that the Second Section should have reached this conclusion and stopped there. This was not the case, however; the Court chose to go beyond and change the object of the application submitted to it. In place of the initial question, “*Have the applicant’s rights been violated by the presence of a crucifix?*”, the Court substituted the following question, “*Is the presence of a crucifix in itself compatible with the idea that (part of) the Court has of what the school environment should be?*”

**II. The Convention cannot create an obligation to remove crucifixes from classrooms**

*Did the former Communist countries violate the Convention when they hung up icons and crucifixes in their classrooms once more after their liberation?* Answering this question allows us to establish whether the Convention creates an obligation to remove crucifixes.

The Second Section gave an affirmative answer to the question, affirming that the State has an obligation of denominational neutrality in compulsory public education, with no consideration of religion, and should seek to inculcate critical thinking in pupils (cf. §56). No symbol of superstition may be tolerated in the school environment: this is the *ratio decidendi* of the judgment of 03 November. By this affirmation, the judgment in November has actually created *ex nihilo* an obligation of secularisation in public education.

In doing so the Court – abandoning all judicial restraint – has not only exceeded the scope of the application submitted to it, but has also exceeded its creative ability at law by manifestly contradicting the interpretation of not only the Convention but also the national practices and traditions of the States party to the Convention. Thus, instead of a legal approach intended to ensure respect for the Convention there is a political approach aimed at imposing a specific teaching model. It is for this reason that the judgment is being contested both legally and politically.

The obligation of secularisation in public education has been created on the basis and by means of a new interpretation of the case-law notions of “neutrality and impartiality” and the “promotion of diversity and tolerance”.

**A. The duty of neutrality and impartiality does not impose the secularisation of the educational environment**

**1. The State must remain neutral and impartial in respect of religions**

The State’s duty of “neutrality and impartiality”<sup>37</sup> derives from the necessary *distinction* between the civil and religious spheres. It would be wrong to deduce from this duty any *obligation* to separate Church and State. It results from this *distinction* (and as Malcolm Evans notes) that the principles of neutrality and impartiality apply to the relations that the

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<sup>37</sup> ECHR, *Leyla Sahin*, para. 107.

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State entertains with religious organisations: the case-law in question has established that the State must remain neutral and impartial in its relations with religious organisations and believers<sup>38</sup>. *The State does not have to be neutral in its own identity, but in its actions with regard to the various religious institutions.* This neutrality is the consequence for the State of respect for the principle of the autonomy of religious institutions. Religious institutions are autonomous in defining their doctrine and in their functioning; the State must be neutral, i.e. impartial towards them. The Court has always emphasised that, in a pluralist democratic society, the State's duty of impartiality and neutrality towards the various religions, cults and beliefs is incompatible with any power of appreciation on its part concerning the legitimacy of the religious beliefs or the means of expressing them<sup>39,40</sup>.

This does not mean that the State should refrain from any structural relation with the dominant religion of the people. Indeed this is largely the case in many European countries. On the contrary, the Court readily accepts that the States have a considerable degree of freedom of appreciation concerning the delicate relationship between the State and religions<sup>41</sup>. The diversity of the types of formal relations between European States and churches is in itself witness to the absence of any obligation of denominational neutrality. Thus in Europe there are national churches (Scandinavian countries), established churches (United Kingdom) and predominant churches (Greece, Spain, Italy). This type of relationship, unlike the scheme of separation, is intended to allow cooperation between civil and religious institutions in achieving the common good. The common good sought is not imagined as having to be exclusively natural and temporal, but as taking account of individual religious needs and of the social dimensions of religion in society. Thus, respect for the *distinction* between the temporal and the spiritual does not prevent, for example, the Danish Parliament holding legislative power in areas involving the material life of the Danish Church, as long as this does not involve the area connected with doctrine. As Francis Messner notes, the national church is fully integrated in Danish society, which is a society based on negotiation<sup>42</sup>.

Thus the rule on relations between Churches and State is the diversity of models, observing respect for the *distinction* between the temporal and the spiritual, and observing respect for national traditions and cultures<sup>43</sup>. Nevertheless, in observing this diversity<sup>44</sup>, it appears that what dominates is seeking the *integration of religion in society*, and not the logic of excluding religion from the social sphere. Even the French model of secularisation is not as exclusive as it appears. Apart from the evolution of the concept towards that of "positive secularisation", which tends precisely towards facilitating the positive expression of religion and its proper integration in society, the Conseil d'Etat has found that the fact of offering posts for teachers of religion in public education does not disregard the principle of secularisation<sup>45</sup>. And in the Alsace and Moselle area, the presence of a crucifix on the wall in public schools is not considered a deviation from the principle of secularisation.

It therefore comes as no surprise that the Court constantly affirms that a State denominational system is not incompatible with observance of the Convention<sup>46</sup>. Consequently, the State's

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<sup>38</sup> M. Evans, *op.cit.*, p.49.

<sup>39</sup> ECHR, 26 September 1996, *Manoussakis and others v. Greece*, para. 47; ECHR, [GC] n° 30985/96 *Hassan and Tchaouch v. Bulgaria*, para. 78.

<sup>40</sup> Levinet, *op.cit.*, para. 54.

<sup>41</sup> ECHR, 27 June 2000, 27417/95, *Cha'are Shalom Ve Tsedek*, para. 84.

<sup>42</sup> Francis Messner, *Régime des cultes [scheme for religious groups]*, JCP Alsace-Moselle, fasc. 230, para. 32.

<sup>43</sup> See for example Article 13 (3) of the Bulgarian Constitution, which recognises the Orthodox Church as the traditional religion of the Republic of Bulgaria because of its cultural and historic role.

<sup>44</sup> See on this point the helpful summary drawn up by Francis Messner in *Régime des cultes, cit.*

<sup>45</sup> Conseil d'Etat, 6 April 2001, no. 219379, *Syndicat national des enseignants du second degré (SNES [national union for secondary education])*.

<sup>46</sup> ECHR, 23 October 1990, 11581/85, *Darby v. Sweden*, para. 45.

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duty of “neutrality and impartiality” cannot be interpreted as imposing public sphere secularisation.

**2. The neutrality of the public sector is not an obligation required by the Convention.**

The Court has often had occasion to pronounce on the compliance with the Convention of obligations of reserve, loyalty and neutrality that the States require of their agents. As the Court constantly affirms, as a general rule the guarantees afforded by the Convention include civil servants<sup>47</sup>; civil servants are not outside the scope of application of the Convention<sup>48</sup>.

Nevertheless, under the national margin for appreciation, the Court has recognised, after checking proportionality, that it does not appear to be necessary or compulsory but legitimate for the State to require public agents to observe discretion in the public expression of their religious convictions<sup>49</sup>. This limitation on the freedom of expression appeared to be legitimate because of the specific features of Turkey. Thus compliance with the Convention of the obligation limited to the denominational neutrality of public agents does not, on the basis of the Convention, create a general obligation of neutrality on the part of public agents or, *a fortiori*, any obligation of denominational neutrality on the part of the entire public sector. It cannot therefore be affirmed that the Convention creates an obligation to secularise the public sector, and more particularly the school environment.

Thus the State has no obligation to observe denominational neutrality. The duty of neutrality and impartiality refers to its actions and not to its existence.

**B. No obligation to secularise teaching may be inferred from the spirit and the objectives of the Convention**

**1. A democratic society is not necessarily secular**

According to the judgment in November, the presence of the religious symbol of the majority religion is not in keeping with the spirit of democracy. In this respect, the Court states that it does not see how the display in the classrooms of public schools of a symbol that is reasonably associated with Roman Catholicism (the majority religion in Italy) could serve the educational diversity that is essential for preserving a democratic society as conceived by the Convention (cf. §56).

Thus the secularisation of the educational environment would be a third-generation case-law creation, deduced from the concept of “educational diversity”, itself deduced from the interpretation of the notion of a “democratic society”.

It is surprising to note that this judgment infers an obligation to secularise the educational environment from the notion of a “democratic society” whereas the Court has affirmed vigorously that when what is at issue is matters concerning the relations between the State and religions on which substantial divergences may reasonably exist in a democratic society, particular importance should be paid to the role of the national decider<sup>50</sup>. If substantial divergences may exist in a democratic society in relations between the State and religions, it is hard to see how the notion of a “democratic society” is able to impose a single – and radically secular – model of public education.

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<sup>47</sup> ECHR, 8 June 1976, *Engel and others v. Netherlands*, para. 54.

<sup>48</sup> ECHR, [G C], 26 September 1995, 17851/91, *Vogt v. Germany*, para. 43.

<sup>49</sup> *Ex pluribus*, ECHR, 24 January 2006, 65500/01, *Kurtulmus v. Turkey*; ECHR, 3 April 2007, 41296/04, *Fatma Karaduman v. Turkey*.

<sup>50</sup> ECHR, *Leyla Sahin*, para. 109.

## **2. The “democratic society” does not ignore religion**

The Council of Europe is not founded on the rejection and the exclusion of Europe’s religious identity and heritage. On the contrary, the States that signed its Statute wanted to found the Council of Europe on the “*spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy*”<sup>51</sup>. Wanting to impose an exclusive conception of religious neutrality would lead to undermining the very foundations of the Convention, since these foundations are none other than the “*spiritual and moral values*” that underpin the Convention, to which the Court frequently refers<sup>52</sup>. Recently, the Heads of State and Heads of Government of the Council of Europe’s Member States once more solemnly reaffirmed their attachment and commitment to these common values and principles rooted in Europe’s cultural, religious and humanist heritage<sup>53</sup>.

Similarly, and among numerous examples, the Parliamentary Assembly has also recalled that democracy and religion should not be incompatible; the civil and religious authorities should be valid partners in efforts in favour of the common good<sup>54</sup>. More specifically, the Assembly has invited the Governments to protect cultural traditions and the various religious festivals and to promote the cultural and social expression of religions<sup>55</sup>.

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<sup>51</sup> Preamble to the Statute of the Council of Europe.

<sup>52</sup> ECHR, *Soering v. United Kingdom*, 7 July 1989, 14038/88: ECHR judgment, p.163, para. 88.

<sup>53</sup> “Warsaw Declaration” adopted at the Third Summit of Heads of State and Government of the Council of Europe, Warsaw, 17 May 2005.

<sup>54</sup> PACE, Recommendation 1720 (2005) *Education and religion*, 4 October 2005.

<sup>55</sup> PACE, Recommendation 1396 (1999) *Religion and democracy*, 27 January 1999, para. 13 iv. c (para. 5).