LIMITATIONS OF SUPRANATIONAL JURISDICTION, JUDICIAL RESTRAINT AND THE NATURE OF TREATY LAW

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I. INTRODUCTION

In March 2011 the Grand Chamber of the European Court of Human Rights (ECtHR) reversed the Chamber judgment in the case of Lausti v. Italy.\(^1\) In November 2009 the Chamber had ruled that the compulsory display of a crucifix in the classrooms of Italian public schools violated the right to freedom of conscience and of religion of the Lausti children and the right of the parents to educate their children in accordance with their own religious beliefs or philosophical convictions. Both those rights are guaranteed by the European Convention of Human Rights (Article 9 of the ECHR and Article 2 of Protocol I). According to the Chamber the principle of confessional state neutrality can be derived from these rights. This principle has not only been recognised by the supreme or constitutional courts of several European countries such as Germany, Switzerland or Poland; it has also been derived from the Italian Constitution by the Italian Constitutional Court as one of the fundamental principles (laicità). The Chamber held that this principle is of special importance in state schools since pupils are present in that environment under a compulsory school attendance law from which they can extract themselves only if their parents make disproportionate efforts and financial sacrifices. Even if no one in a pluralistic society can claim to be spared from perceiving the manifestations of religious faith and practice by his fellow citizens, this is different when it is the state that exposes individuals without possibility to escape to the influence of the symbols of a particular religious faith. The Chamber emphasized that the negative right to freedom from religion deserved special protection against the expression of a confessional belief by the state itself through the display of a symbol of which the significance is predominantly religious.

The Chamber ruling provoked an unprecedented flood of reactions and commentaries both for and against the ruling. In an article about the Chamber judgment that was published in the Dutch Journal of Constitutional Law.

\(^1\) Lausti and Others v. Italy, 18 March 2011, European Court of Human Rights (Grand Chamber), No. 30814/06 (Grand Chamber decision of Lausti I); and Lausti v. Italy, 3 November 2009, European Court of Human Rights (Second Section), No. 30814/06 (Chamber decision or Lausti I).
I wrote that the Court had ironed out the contradictions between the domestic courts in matters concerning the public display of religious symbols. The Italian Court of Cassation, which is the highest Court in civil and penal matters, had ruled that the display of a crucifix in Italian polling stations constituted a violation of the principle of state neutrality in religious matters. In the same spirit, the Italian Constitutional Court had issued several rulings in which it underscored that the principle of laicité from which the duty of state neutrality is derived, was fundamental to the constitutional order. On the other hand, the Italian administrative courts up to the highest level, the consiglio di stato, had found no objection to the display of the crucifix, because it had to be interpreted as a symbol, not only of universal Christian love and religious tolerance but even of laicité. We should not focus on the—in my opinion—obvious absurdity of this interpretation according to which the core symbol of a particular religious belief is also a symbol of state neutrality. More important is the fact that the different levels of administrative jurisdiction repeatedly confirmed and maintained this interpretation. I will come back to this issue.

The storm of protest that rose after Lusti I shows that the Chamber had underestimated that large majorities in some European countries are devoted to their cultural and religious heritage and to the public visualization of that heritage, while they at the same time recognize the freedom of conscience and religion. There is no consensus throughout Europe about the best way to render compatible the right to freedom of conscience and the existing religious pluralism on the one hand with national preferences for the majority-religion on the other. Personally, I think that religious and philosophical neutrality of the state can best be achieved through public secularism understood as a normative constitutional doctrine which separates the religious realm from state politics and takes a stance of equidistance towards any religious creed as well as toward agnosticism or atheism. Such a conception of secularism as a constitutional doctrine should be carefully distinguished from state atheism, anti-religious activism or any other identification of the state with a particularistic creed or philosophy of life. The constitutional doctrine of the secular state implies respect for freedom of and from religion and for all religious practices in society as long as they are compatible with public order and as long as they do not infringe on the analogical rights and freedoms of others. Secularism understood as a normative constitutional doctrine in my view is the most adequate model to keep the peace in multicultural and religiously pluralistic societies and to combine tolerance and respect for diversity without the state becoming an easy prey to ever more particularistic claims for recognition and financial support. According to this conception of public secularism, it is not for the state to take sides in matters about philosophies of life or religion and it is not for the state either to financially subsidize religious practices, denominational schools or any other religious or anti-religious activities. In my opinion the French laïcité and the American legal doctrine concerning the 'wall of separation' between church and state, are the two types of national constitutional constructions which correspond most closely to the described normative model of public secularism. But we should immediately add that reality is always much more complex than our normative frameworks and hence accommodations of the theoretical ideal to types of limited and indirect support of the majority religion and to subsequently raised reasonable demands for recognition and equal treatment of minority religions, are not incompatible with these theoretical ideals. The conditions for such accommodations to be acceptable are that they should be the exception to the rule and that public funds should never be granted for the advancement of one particular belief but only to enhance the realisation of secular goals through the support of different organisations some of which may have a religious affiliation.

From the perspective of this normative constitutional doctrine of public secularism the Chamber judgement in the Lusti case could count on my sympathy. For a crucifix is the core symbol of one particular religion, Catholicism, and as such it should not be exhibited in classrooms of public schools, because this would at least create an objective impression of partiality and identification of the state with one particular religion at the exclusion of all others. But despite that, I nevertheless think that there are very good reasons to consider that the decision of the Grand Chamber which overruled the Chamber Judgement, is the better of the two rulings. To assess these reasons, it is important to understand that the constitutional model of separation of church and state has been realised nowhere in its theoretical purity, and when one looks closely into the different constitutional arrangements throughout Europe, it becomes obvious that the strict separationist model is in actual fact a minority position. That means that expressing a preference for separationism in relation to a state that has a different constitutional framework with regard to the relation between religion and state, becomes a matter of ideological choice and a matter of political militancy and hence this is an attitude that is appropriate for a citizen or an interest group expressing their political preferences, but not for an international human rights court. The supporters of Lusti I could retort that even if the separationist stance is not universally accepted in Europe, this is different for the principle of religious neutrality of the state, because it can be derived from the rights protected under Article 9 of the Convention and Article 2 of Protocol I. But even that is an overstatement and not a correct interpretation of the Convention as I will show in the subsequent paras.
One could find the opinion that the Grand Chamber's judgement is to be preferred on purely pragmatic grounds analogous to the reasons given in a comparable context by Jules Ferry, one of the architects of the French laïcité. Although Ferry was an anticlerical activist and the 'father' of the French system of public education at the beginning of the twentieth century, he did not want to force the Catholics to remove the crucifixes right away when their parochial schools were transformed into public schools by the French government. Ferry did not want to intensify an already open conflict with the Catholics and he was cautious to avoid that the anti-clerical battle against church interference with state affairs would degenerate in an anti-religious crusade aiming to extirpate all religious elements from society. But as valuable as these pragmatic reasons in favour of political moderation were in France at the beginning of the twentieth century, and as valuable as they are today, they should not distract us from the more principled legal and political arguments for which Lautsi I, which denies that the crucifix in Italian public schools constitutes a violation of rights protected under the ECHR, should be preferred to the Chamber judgement.

II. REACTIONS TO LAUTSI I: POLITICIANS AND INTEREST GROUPS

There were many emotional reactions to the chamber ruling. Crosses were painted on the walls of the premises of the Italian radical party (Radicali Italiani), who had publicly supported the Chamber ruling. The Lautsi-Albertini family was harassed, their house was plastered with crosses and their pictures were put on posters with the inscription "wanted". The Italian minister of defence Ignazio La Russa reached a low point of shamelessness by ranting on for minutes against the Chamber ruling in a TV talk show. He said that the crucifixes would be maintained in all the public buildings and shouted repeatedly "they can die", together with that "fake international organisation that counts for nothing".

In the European Parliament several interest groups and political fractions campaigned for and against the ruling. Motions for resolutions for and against the ruling were issued. That led sometimes to unexpected coalitions. The socialist fraction joined the right wing in support of a draft resolution that claimed the right to display religious symbols on the basis of the subsidiarity principle. In reaction to that the European environmental parties issued a counter resolution about human rights, religious symbols and subsidiarity with the demand that the Lautsi I ruling should be fully complied with. Among other things the resolution also ridiculously stated that "only states based on the principle of the separation of church and state—as opposed to theocratic states—can find the proper solutions to safeguard everybody's right to freedom of thought, conscience and religion, the right to education and the prohibition of discrimination". As in England and Denmark, which have no separation of church and state but a state church system, or Germany and Belgium, which have a system of officially recognized religions that receive a preferential treatment, would not be capable of respecting the freedom of conscience and of religious minorities.

In a vigorous reaction to the Chamber ruling David Pollock, president of the European Humanist Federation (EHF), argued that if the crucifixes were not banned from the classrooms of public schools, then it would become possible under the subsidiarity principle in the future that elementary rights of the Roma would be violated or suspects of terrorism would be summarily executed. According to Pollock a majority is never entitled to remove the rights of even one individual contrary to the law and the Convention. But what about restrictions of rights recognized under the Convention in accordance with the law, with rules of proportionality and with other criteria developed by the ECHR? Apparently Pollock denies right away that such rules do apply in this case, but he does not give one conclusive argument why that is so. In Italy more than hundred organisations that support the separation of church and state reacted to Lautsi I in an open letter to the Council of Europe. A lot of these reactions that were quickly written and posted on the internet stood out for their superficiality and lack of knowledge about the historical complexity of the relations between religion and state throughout Europe.

III. REACTIONS TO LAUTSI I: THIRD PARTY INTERVENERS

The intellectual level of the discussion rose significantly with the legal memoranda of different third party interveners that had been accepted to expose

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3 Available at <http://www.youtube.com/watch?v=goWDmhNvGr0>.
their view on the case before the Grand Chamber. In my opinion the Memorandum of the European Centre of Law and Justice (ECLI) that was a forceful critique of Lautsi I stood out for the quality of its inquiry into the complex relations between religion and state in Europe and for the profound knowledge of the relevant case law of the ECHR.10 On 30 June 2010, the Grand Chamber held a public hearing and here the opponents of the Chamber ruling were again imposing. That was the case with the counsel representing the state and even more so with the elegant and rhetorically ingenious plea of Professor Joseph Weiler, who represented a group of states that opposed the Chamber ruling.

The ECLI-memo written by Grégoire Puppinck en Kris Wenberg argued that the decision of the Chamber to translate the freedom of religion and conscience guaranteed by Article 9 of the European Convention and the right of parents to raise their children in accordance with their own religious or philosophical convictions into a requirement of complete confessional neutrality, was a profound misconception, not only of the Convention, but also of the relevant case law of the Court. In the Belgian linguistic case of 1968, the Court had explicitly stated that in sensitive matters it was important to take into account the domestic arrangements in the member states and that it could not supersede the competent domestic authorities "for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention."11 On the substantive matter, the memo argues that a crucifix, in the absence of any explicit directive concerning its significance or how to behave in its presence, cannot be seen as a state regulation about the appropriate way to think in religious matters or about what one should or should not believe. And if such a symbol should have an emotional influence on the school children, it does not reach the intensity that constitutes a violation of the Convention. The Chamber erred because it applied inadequate criteria that are normal for secularist states such as France or Turkey but do not fit to the Italian reality concerning church-state relations. With regard to the relations between religion and state Europe is a colourful patchwork of very different constitutional designs.

The revision of the Lateran treaty of 1929, which resulted in the additional protocol to the treaty that was ratified in 1985, should be borne in mind. With that revision of the treaty Italy made an end to the status of the Catholic Church as a state church and explicitly recognizes that the state and the church are "each in their own order, independent and sovereign".12 But that does not amount to a strict separation of church and state, as the whole document testifies of different sorts of cooperation and interaction between the two. Article 9, second para., of the agreement provides that:

the Italian Republic, recognizing the value of the religious culture and considering that the principles of the Catholic Church are part of the historical heritage of the Italian people, shall continue to assure, within the framework of the scope of the schools, the teaching of Catholic religion in the public schools of every order and grade except for Universities. With respect for the freedom of conscience and educational responsibility of the parents, everyone shall be granted the right to choose whether or not to receive religious instruction. When they enrol, the students or their parents shall exercise this right at the request of the school authority and their choice shall not give rise to any form of discrimination.13

This provision integrates the interest in conservation of the religious heritage into the constitutional framework of the Italian Republic and makes it compatible with freedom of conscience and religion and with the parental freedom to educate children in accordance with philosophical or religious convictions that are not those of the majority religion.

Notwithstanding this freedom of conscience, the conservation of the religious heritage becomes a public interest of the Italian state through Article 9, second para. of the agreement, regardless of whether public secularists—such as myself—for that or not. As the ECLI-memo correctly underscores, the Lautsi I ruling does not even mention this aspect of the Italian constitutional framework. Therefore the Chamber loses sight of the legal approval of an important aspect of the cultural dimension of Italian public life and erroneously considered it to be legitimate to impose a vision of state neutrality on Italy that does not fit with the complex and historically grown relation between religion and state in that country. As the ECLI-memo pertinently argues, there is no legal ground for imposing such a uniform conception of state neutrality under the ECHR.

The ECLI-memo further argues that this conclusion can also be drawn from the case law of the Court. In view of the absence of a uniform conception of the relation between religion and state in Europe, there should be granted a wide margin of appreciation to the members of the Council of Europe. That was the opinion of the Court in Leyla Sahin v. Turkey14, where the question rose whether it was legitimate under the Convention that the Turkish authorities

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11 Belgian Linguistic Case, 23 July 1968, European Court of Human Rights, Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; and 2126/64.
13 Idem.
14 Leyla Sahin v. Turkey, 10 November 2005, European Court of Human Rights (GC), No. 41774/98.
forbid a student to wear an Islamic headscarf while attending university courses. In this ruling the Court explicitly admits that:

it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... and the meaning or impact of the public expression of a religious belief will differ according to time and context ... Rules in this sphere will consequently vary from one country to another according to national traditions ... Accordingly, the choice of the extend and form such regulations should take, must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context ... 18

Consequently the Court underscored the need to draw on the conception of secular politics that was elaborated in the national constitutional order and in the case law of the national constitutional court. Within the limits imposed on them by the Convention, each member state has room for manoeuvre to deploy its own conception of the relation between religion and politics.

IV. THE COURT’S CASE LAW

Grégor Puppinck and Kris Wenberg, the authors of the ECLI-memo, went on to substantiate their view by analyzing the remaining relevant case law. As the ECLI is a conservative Christian think-tank, a club with a mission so to speak (which is perfectly legitimate, but does not a priori guarantee an unbiased analysis of the case law), I wanted to check whether their interpretations were not tendentious. After careful reading of the cases, I could only admit that they were right: Lautsi 1 constituted quite definitely a bigger departure from the previous case law than I initially thought. With regard to the setting of the curriculum for state schools the Court held in Kjeldsen, Busk Madson and Pedersen v. Denmark:

in particular, the second sentence of Article 2 of the Protocol does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable ... the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded. 19

18 Ibid., para. 109.
19 Kjeldsen, Busk Madson and Pedersen v. Denmark, 7 December 1976, Nos. 50957/71, 59207/72, 59267/72, para. 55.

This has become a canonical citation that has been ritually repeated since then in all the major cases pertaining to Article 2 of Protocol I. In Folgerø v. Norway the Court held that although the teaching course of KRI (Christianity, Religion and Philosophy of Life) was relatively one-sided because it paid much more attention to Christianity in its Lutheran version than to other religions and philosophies of life, that of its own could not be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination. 20 The one-sidedness in the setting of the curriculum would have fallen within the margin of appreciation of the state as it ensued from the national history and tradition which was institutionalized in the Norwegian state-church system on condition that nobody would have been coerced to take KRI classes. However the Court did find a violation of the Convention because the partial exemption arrangement put a burden of justification on the shoulders of the parents that was considered unacceptable. An analogous conclusion was reached in Hasan and Eylem Zengin v. Turkey. 21 Here the plaintiffs were Alevis who considered that the religion subject paid one-sided attention to the Sunni interpretation of Islam, which was the religion of the majority. Despite the fact that Turkey is a secular state, this one-sided religious education was not in itself considered to constitute a violation of the obligation of pluralism and objectivity. What did amount to a violation was that, here again, there was no sound exemption arrangement.

In view of these rulings it is indeed incongruous that a symbolic remembrance of the religious heritage of the Italian culture in the public school was considered to be in breach of the Convention, despite the fact that the crucifix was not in any way accompanied by a teaching program, by any sort of indoctrination or by rules how to behave in presence of it. Considering the fact that religious courses in Italian public schools are optional; that other religions are accepted; that Islamic girls have the right to wear headscarves and that the beginning and the end of the Ramadan were often celebrated, the contention of the Italian state that the crucifix is not intended as a strong religious symbol, is not by definition false or untenable. And consequentially the decision to remind the schoolchildren of the religious heritage of the Italian culture should be considered to lie within the margin of appreciation of the state.

V. EUROPE’S CONSTITUTIONAL PLURALISM

Many legal and political philosophers (including myself) think that separation between religion and politics understood as a normative constitutional model
is the best available arrangement to facilitate the peaceful coexistence of different religions and philosophies of life. But the ECHR and the case law of the ECHR do not at all imply that separationism should become a common characteristic of the constitutional systems of each member of the Council of Europe. Amongst these members there are considerable differences as to their constitutional design with regard to the relation between state and religion. Some countries have a separationist system (France, Turkey, some Swiss Cantons); others officially recognize and support a limited number of religions (Germany, Belgium); some combine a 'separationist' constitutional principle with a practice that is very generous and accommodationist to other religions (the Netherlands); and still others have state church systems with different degrees of openness to accommodation (England, Finland, Denmark). These different constitutional designs evolved from the specific history, the religious conflicts and political settlements in these countries. With regard to state church systems, the former European Commission of Human Rights held in 1989 that:

A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church.¹⁹

In view of the wording of Article 9 of the European Convention and Article 2 of the first Protocol, and in view of the fact that many of the national constitutional arrangements concerning religion and state predate the ratification of the Convention by these states, elevating the principle of complete state neutrality to a generalized norm as the Chamber in fact did in Lautsi I cannot be a correct interpretation of the Convention, however much public secularists may think that such neutrality would be desirable. By ruling as if there was a consensus about that desirability, the Court lost sight of reality. And by trying to impose such complete state neutrality, it lost sight of the subsidiary nature of its jurisdiction. Or to cite the forceful conclusion of the ECLJ-memo with which even a public secularist as myself can fully agree: "the Convention was not designed to erase the religious roots of member states or to obliterate their memory from public education. Rather the states contracted as parties with the full understanding that they were free to choose their own form of relationship between state and church, including within their educational systems."²⁰

²⁰ ECLJ memorandum, supra note 10, at Conclusion.
calendar to the public holidays, the vast majority of which are Christian feasts and from the omnipresent churches and cathedrals to institutions such as marital monogamy. And in order to realise such a plan with a view to erasing an important part of the cultural heritage of a people from public visibility, that party would have to exercise state power in a totalitarian fashion. Only the Jacobin terror regime during the French Revolution or Russian Stalinism succeeded in realising such a wicked undertaking for some time. Obviously, it is ridiculous to read Lautsi I as if such an intention were the underlying rationale of the ruling. And yet some of the opponents of the Chamber ruling stretched their insinuations in a rhetorically effective manner in that direction.

VII. THE PLEA OF JOSEPH WEILER BEFORE THE GRAND CHAMBER

The final attack of the anti-Lautsi I campaign was launched by Joseph Weiler, professor at the New York University Law School. He was counsel for a pro bono basis for Malta and seven other governments. In the specific context of the case, it was an expressive gesture that Weiler, who is a Jew, wore a kippah while he made his plea before the Grand Chamber at the oral hearing. A practising Jew who defends the presence of a crucifix in public schools, this is indeed a remarkable scene. This situation is especially unexpected when one realises that there has been a long tradition of Catholic anti-Judaism specifically related to the crucifixion of Jesus Christ. And besides the vast majority of the American Jews have traditionally been the most ardent supporters (in coalition with mainstream Protestantism) of the American wall of separation between church and state.23 Weiler praised the cultural and constitutional diversity in Europe and underscored that total religious state neutrality had never been the rule in Europe. The duty to respect freedom of and from religion is a common constitutional asset of Europe. But these obligations are also counterbalanced by a considerable liberty for the states as to the presence and visibility of religion in the public square. France has a separationist regime but on the other side of the channel, in England, the Queen is head of the Anglican Church, and prominent church leaders have a seat in the House of Lords.

23 This anti-Judaism was based on the gospels of John: 8:44 and Matthew: 27:25. See also the significance of the ‘impropriety’ or ‘reproaches’ of Christ to his people in the traditional Catholic liturgy.


The national anthem is a prayer to God to save the Queen, and the cross figures in the flag. If one would adopt the logic of Lautsi I, a display of a picture of the Queen in a public school would have to be prohibited.

And this would equally be the case with reading the Irish Constitution in an Irish classroom or the German Constitution in a German classroom, for the preamble of the former refers to the Holy Trinity and to Jesus Christ and the preamble of the latter proclaims that the German People give themselves their Constitution in full awareness of their “responsibility before God.”24 To Weiler such an obligation to become a laïc state would herald a new era of European uniformity and bring an end to its rich and proud constitutional diversity. I agree with Joseph Weiler that this would be regrettable, but I also think that there is no chance whatsoever that such a program of uniformization backed up by the ECHR would ever succeed because it would never be accepted by the peoples of the states that would be affected by it.

In line with the ECLI-memo, Weiler also underscored the subsidiary nature of the Court’s jurisdiction. Italy has the right to evolve to more laïcité, but it is for the Italians to choose whether they want this or not. The consequence of the Lautsi I ruling is that Italy is obliged to evolve to more laïcité and that is not a correct interpretation of the Convention. If the peoples of Europe want to let their constitutional systems evolve with regard to the relation between religion and state, they can do so, but it is not for the ECHR to decide that. As a rhetorical summit of his plea Weiler said that to introduce an obligation to embrace a uniform type of state-church relation throughout Europe, would be an Americanization of Europe that would put an end to the proud European constitutional diversity. Americanization in two respects: firstly by introducing a uniform constitutional arrangement of the relation between religion and the state; and secondly by erecting a rigid separationist stance as a common European obligation.

VIII. THE GRAND CHAMBER RULING

It is crystal clear that the Grand Chamber has been profoundly influenced by the central anti-Lautsi I arguments of the different third party interventions that I discussed. The Grand Chamber takes the justified criticism from different parties that the Court is not a constitutional court seriously. To render a
judgement about the compatibility of the crucifix with the Italian constitutional principle of 'laicité' is not a task for the European Court. Reading between the lines, this means that the Italian Courts which disagree on the subject should solve this problem themselves and that the Chamber erred when it thought that it was entitled to decide the matter instead of the Italian legal order. Therefore the Grand Chamber holds in Lautsi that "it is not for the Court to take a position regarding a domestic debate among domestic courts" (para. 68). I think that this is a correct assessment, because the Chamber ruling implied a legally unwarranted value judgement about the legitimacy of the Italian constitutional order without clear evidence that the state had violated the rights of the Lautsi, or even worse, that such violations are structurally linked to the Italian constitutional design of state-religion affairs.

The Grand Chamber was therefore right when it tightly framed the Lautsi case to the question whether the right of the parents to educate their children in accordance with their own religious or philosophical convictions had been violated, thereby considering Article 2 of Protocol I in matters relating to education as the lex specialis in relation to Article 9 of the Convention. In accordance with the relevant case law the Grand Chamber holds that the setting and planning of the curriculum fall within the competence of the contracting states including the incorporation of religious and philosophical matters, as long as these teachings do not amount to indoctrination or proselytism. The continuation of the tradition to display a religious symbol in the classroom that confers on the country's majority religion a preponderant visibility in the school environment, falls also within the margin of appreciation of the state on condition that this does not imply a process of indoctrination and does not infringe upon the rights of parents in religious and philosophical matters. In view of the fact that the display of the crucifix did not imply any further compulsory teaching or didactic speech about Christianity; that it does not demand acts of devotion or worship (to the court it is only a "passive symbol"); that the Italian public school environment is open and tolerant to other religions and to non-believers; that pupils are free to wear Islamic headscarves and that optional religious education could be organised for other religions, the Grand Chamber concluded that there had been no violation of the relevant rights of the Convention.

Although it may not be ruled out that some persons can be offended by the contemplation of the crucifix, it does not appear from the facts that Mrs Lautsi's children have been emotionally disturbed to a damaging degree or that they have been coerced into a belief or a conviction which they or their parents did not choose themselves. As Judge Rozakis pertinently added in his concurrence opinion, even if the display of the crucifix objectively affects neutrality and impartiality, the core question is whether in the present case it does so to an extent that justifies the finding of a breach of the Convention. In that regard Judge Power rightly remarks in her concurring opinion that the test under Article 9 is not whether something is subjectively perceived as "offensive", but whether someone is coerced into a belief that violates his or her freedom of conscience or whether she or he has been actively hindered in his freedom of religion.

IX. Of 'Strong' v. 'Passive' Symbols

One could wonder why the mandatory crucifix in the Italian public school is qualified as a "passive symbol" while in other cases, the Islamic headscarf of Mrs Sahin,24 or even better, the headscarf of Mrs Dahlab,25 who was a teacher in a Swiss public school, was qualified by the Court as a strong religious symbol. But I am afraid that this question is misleading because it suggests that the state and the classroom walls have more rights to religious freedom than the teacher or the pupils in the classroom, and that is a fallacious comparison. What should be compared are two types of restriction of human rights and the different contexts in which they occur: the restriction of the positive religious freedom of Mrs Dahlab who was not allowed to wear an Islamic headscarf by the authorities of the Canton of Geneva and the restriction of the negative religious freedom (freedom from religion) of the Lautsi who claimed the right not to be confronted with the core symbol of the majority religion, by the Italian state. All too often cases are compared in an abstract manner, without taking into account all the relevant circumstances and differences. Such an abstract comparison easily leads to false conclusions. In the Dahlab case the teacher was subject to the duty of neutrality of teachers in public schools during school time. In Switzerland the Cantons are autonomous to choose their own regime of relations between the authorities and religion. There are Cantons with an official cantonal church ("Landeskirche"), cantons which officially recognize religions (mostly Catholic and Reformed Evangelical and sometimes also the Jewish religion) and finally also two cantons which have opted for a separationist regime, Neuchâtel and Geneva. Since 1907 the Canton of Geneva, where Mrs Dahlab was a teacher, had chosen very decisively for a separation between church and state and a confessionally neutral public education system.26 The Court took also into consideration that Mrs Dahlab taught very

24 Leyla Sahin v. Turkey, supra note 14.
consistent state neutrality from the Convention in an analogous manner as the Bundesverfassungsgericht derived this principle from the Federal German Constitution. And yet the Chamber found the crucifix inherently a strong religious symbol that objectively violated the pupils’ entitlement to negative freedom of conscience (freedom from religion) and the parents’ liberty of education. With this interpretation the Court denied the state’s competence to give a stipulative definition of the significance of the crucifix, the plausibility of which could have been tested by the Court by checking all the accessory claims of the government about the religious ‘passivity’ of the symbol and its strength in sending a signal of openness and tolerance. In doing so the Chamber not only denied that this power to define was the prerogative of democratic state power, but it arrogated the power to define the significance of the crucifix for itself and thereby it acted as if it were a Constitutional Court.

Of course the Chamber only ventured itself into constitutional high ground because the Italian Constitutional Court had derived the principle of denominational state neutrality as a fundamental principle of the Italian Constitution and the penal division of the Court of Cassation had ruled that the crucifix infringed the principle of laicité and the impartiality of the state and that it constituted a violation of the freedom of conscience of those who did not accept that symbol. But this line of interpretation was blatantly contradicted by the Italian administrative jurisdiction, which was more or less in line with the crucifix-theory presented by the government and went even further by asserting that the crucifix inter alia symbolized all that was implied by the concept of laicité. As I already mentioned, I do not think that this substantive interpretation by the Italian administrative courts has much credibility (and neither did the Chamber). But that leaves untouched that the administrative courts had jurisdiction to decide this case and that they stuck to their interpretation. In that light it was a bridge too far for the Chamber to decide which line of interpretation was the right one in a dispute amongst domestic courts, especially since the Constitutional Court had declared itself incompetent in the Lautsi case because the regulations imposing the display of the crucifix had not the status of a formal law. In doing so the Constitutional Court had indicated implicitly that the administrative Courts were the competent jurisdiction as long as the legislator had not enacted a formal law that settled the matter of the crucifix and that could have been subjected to a control of constitutionality. And hence it is not the credibility of the administrative rulings on the substantive level (or the lack thereof) that is most important. What is important here is the question: who is competent? Is it the Italian administrative jurisdiction as the decision of the Constitutional Court implied? Or is it legitimate for the ECtHR to settle the matter in a manner that did not restrict itself to the tightly framed question whether the rights of the Lautsits had been violated, but that
contained also a judgment about the significance of the crucifix in the public school environment that denied the prerogative of the state to define what the significance of that symbol was.

Let me try to answer the question by making a comparison. In 1989 the US Supreme Court ruled that the County of Allegheny had violated the First Amendment’s Establishment Clause because it had allowed a Roman Catholic society to display a crèche representing a nativity scene on the grand staircase of the County Courthouse in downtown Pittsburgh. The Court held that the question whether a symbol has a predominantly religious significance depends on the specific setting. The crèche included "figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims Gloria in Excelsis Deo". This praise to God was judged to be indisputably religious, even sectarian, "just as it is when said in the gospel or in a church service". Nothing in the context of the display distracted from the religious significance of the crèche in opposition to another case where the Court considered the crèche, which was mixed with secular symbols, had a legitimate secular purpose within the context of a holiday display meant to celebrate the season and the origins of Christmas, which was considered to be a part of Western culture. By permitting the display of the crèche on the grand stairway, the most impressive part of a building that is the seat of county government, an unmistakable message in support of the Christian praise to God was sent to the public. As the Establishment Clause of the First Amendment to the US Constitution means at the very least that government may not demonstrate an endorsement or a disapproval of one particular creed including a preference for Christianity over other religions, the display of the crèche was unconstitutional (5–4). In the same ruling, a different majority (6–3) held that the display of a large Christmas tree in combination with a menorah and a sign saluting liberty did not violate the Establishment Clause because the specific setting of these objects could not likely be perceived as an "endorsement" or a "disapproval" of particular religious beliefs and "must be understood as conveying the city’s secular recognition of different traditions for celebrating the winter-holiday season".

The difference between the unconstitutional display of the crèche and the constitutional display of the three other symbols depended on a casuistic finding based on all the contextual elements of the specific setting. But the Justices strongly disagreed about the finding. Four of them found that both displays were constitutional. Three Justices found both displays were unconstitutional. The whole outcome of the case, including the different legal qualification of the two displays was largely dependent on two justices who found the crèche unconstitutional and the group of symbols with the menorah constitutional. This shows that not only reasonable citizens but even highly educated legal professionals can profoundly disagree as to the meaning of ‘religious’ symbols in a specific context. In so far there is not so much difference with the Lauti case where the meaning of the crucifix as a predominantly religious symbol capable of carrying also certain secular meanings, was highly disputed.

However, the true difference between these US Establishment Clause cases and Lauti I, is that the legitimacy and jurisdiction of the Supreme Court, as divided as this Court sometimes can be, and as divided as it was in the case of the crèche v. the menorah group, were never seriously disputed. The same cannot be said about the ECtHR after Lautsi I. Why that difference? As Lord Hoffmann so pertinently argued in his speech about the "The University of Human Rights", the main reason for the great respect that the Supreme Court enjoys in the US is that it has constitutional legitimacy. It is an "American Court, created by the Constitution, appointed by the President, confirmed by the Senate, an essential and historic part of the community which they serve". They have a special constitutional legitimacy to interpret the meaning and the scope of application of the US Bill of Rights. For human rights may be universal on the abstract level, but they are national in their application, because when they are confronted with "the messy detail of concrete problems ... their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system".

The ECtHR lacks this level of legitimacy, as it is not the Constitutional Court of the United States of Europe. The fact that 47 states adhere to an identical codification of human rights does not mean that they agreed to have all the same penal procedures; the same asylum procedures or the same constitutional arrangements regarding the relation between religion and the state. And that implies that the application of the abstract human rights can differ between states without such being a violation of the Convention. The Strasbourg Court has no mandate to unify the many national laws of the member states of the Council of Europe that have human rights implications, or to lay down a federal law of Europe by means of judicial human rights activism. The ECtHR should restrict itself to the role of a guardian who watches over the serious

30 County of Allegheny v. American Civil Liberties Union, supra note 28.
human rights abuses, rather than arrogating itself the right to replace elected governments and domestic courts in the job of meticulously balancing the rights of individuals or minorities against legitimate countervailing interests. Striking examples of a Court "unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States" have been given, not only by Lord Hoffmann, but also by Marc Bossuyt, the actual president of the Belgian Constitutional Court.69

Lord Hoffmann gives another important reason why the ECtHR lacks this constitutional legitimacy and hence should be very cautious in extending its tendency toward judicial lawmaking: "The Court now has 47 judges, one for each member state of the Council of Europe. One country, one judge; so that Liechtenstein, San Marino, Monaco and Andorra, which have a combined population slightly less than that of the London Borough of Islington, have four judges and Russia, with a population of 140 million, has one judge. The judges are elected by a sub-committee of the Council of Europe's Parliamentary Assembly, which consists of 18 members chaired by a Latvian politician, on which the UK representatives are a Labour politician with a trade union background and no legal qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practised. They choose from lists of 3 drawn by the governments of the 47 members in a manner which is totally opaque.70 An international Court composed in such a manner and lacking constitutional legitimacy is arrogating itself the role under the Convention to decide whether the government of the UK had struck the right balance between the interests of the local residents and the economic interests of the country concerning night flights at Heathrow.71 This is only one of the examples given by Lord Hoffmann. He is perfectly right to think that this is ludicrous. As if the elected government from a country that has integrated the ECtHR in its constitutional framework through the UK Human Rights Act (1998), and whose decisions are checked by the domestic courts, could not decide this for itself.

The research of Marc Bossuyt shows that the Strasbourg Court also regularly walks on "thin ice" in asylum cases. Instead of exercising a 'marginal review' of the decisions of the competent national authorities, limiting itself to check whether national legislation and decisions of highest domestic courts are not manifestly unreasonable or in clear violation of Convention rights, the Court "goes very far in re-examining the merits of asylum applications, including the credibility of the applicants".72 In operating this way the Court empowers itself not only to function as an international Court which controls whether the domestic legislation and procedures are in conformity with the Convention, but also as a Court of Appeals re-examining the substantive content of asylum cases, as a Court of Cassation assessing whether the domestic law has been correctly applied and as an interim injunction judge deciding provisional measures.73 No domestic Court is capable of cumulating all these functions, but the Strasbourg Court thinks she can. To paraphrase Lord Hoffmann: what grandeur to combine the legislative power to decree the content of the European public order with the attention to detail of the judge of fact confronting himself with the messy detail of concrete cases! It is however out of the question that the state parties had ever the intention to entrust the Court with such herculean judicial powers. In view of these facts, it is hardly surprising that the legitimacy of the Court is eroding, as the ongoing actual discussion in the UK, in the Netherlands and elsewhere shows.

The member states of the Council of Europe all recognize the jurisdiction of the Court in all matters concerning the interpretation and application of the Convention and Article 32 provides that the Court is itself competent to decide whether or not it has jurisdiction over a case whenever a dispute should arise about that issue. This is far reaching because it means that the Court itself and not the state parties decide whether the Court is competent in any case pertaining to human rights. However, that does not imply that the state parties have surrendered their legislative sovereignty in a multitude of matters pertaining to human rights to the Strasbourg Court. They remain independent nations with their own legal system and the competence to wield their power of self-government and to let their own judicial bodies check these powers. In spite of that, the ECtHR on numerous occasions has lost sight of the subsidiary assessment of the reliability of the account given by asylum seekers. Cf. Concurring opinion of W. Thiemann to Said v. Netherlands (reference by Bossuyt, supra note 36: "Judges on Thin Ice").

Bossuyt, supra note 36 ("Judges on Thin Ice"). At p. 47, writes that "the situation becomes untenable if respect for the Convention would require that remedies exercised against the expulsion measure would suppose a re-examination of the political situation in the country of origin. The alleged new developments should not be examined by the instance of remedy against the expulsion measure but in the frame of a new application before the body competent on the merits. If the domestic legal system does not anticipate highly accelerated and shortened procedures in case so-called 'new' applications are submitted successively by the same person, those allegations will trigger a 'cumulat' phenomenon which would prevent any decision from ever becoming enforceable and thus from ever being enforced."

Ibid., p. 47.
nature of its jurisdiction and has not taken the doctrine of the margin of appreciation nearly far enough. With regard to this doctrine, the Court often refers to the argument that in matters of expediency (and within the limits of the Convention) deference to the national authorities has to be granted because they are better placed to have an intimate knowledge of the problems, needs and sensitivities of their own society. But as Lord Hoffmann pertinently points out, in this way the Court treats the margin as a matter of concession to a member state; it abstains itself from exercising its vast jurisdiction over any matter pertaining to human rights when it thinks that the local political and judicial authorities are better equipped to do so. In addition, the argument in favour of deference should be premised on the lack of constitutional legitimacy: the European Court has no right to intervene in matters on which a member state has not surrendered its sovereign legislative powers. In the words of Lord Hoffmann, "[e]ven if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind which I have been discussing to be made by a foreign court." 82

XI. Judicial Restraint, Subsidiarity and the Nature of Treaty Law

Some have stigmatised the Grand Chamber ruling in Laatsu as a capitulation of the Court for a "Holy Alliance" against Laatsu I and in favour of a "rechristianisation" of Europe. 83 This alliance unites Catholics, Orthodox Christians, and according to some there is even a connection with fundamentalist American evangelicals through the relations between the ECLI and its American equivalent, the American Centre of Law and Justice, a very active conservative Christian pro-life law firm often acting as the opponent of the well known American Civil Liberties Union (ACLU) in filing Amicus Curiae briefs on the occasion of cases that have to be decided by the Supreme Court. 84 Even if there can be no doubt that these ad hoc coalitions have been active in the Laatsu case, there is however no reason to believe in an obscure conspiracy initiated for the purpose of starting a new crusade against public secularism and in favour of a new Christian theocracy. The precarious unity of all these different Christian churches and interest groups was not so much in favour of the mandatory Catholic crucifix (which some protestant denominations taking the sola scriptura rule strictly, reject as blasphemous by the way) but it was predominantly directed against what was interpreted as a court ruling that could be the beginning of an aggressive secularist judicial policy resulting in the purge of all kinds of public manifestations of religion in Europe. I think that this is an overreaction, for it was certainly not the intention of the Chamber, presided over by Judge Tulkens, to erase all things religious from the public square no matter what the context of their appearance is. Nevertheless its ruling rested on the erroneous assumption that there is a wide European consensus on the obligation to adopt a robust separationist stance. The reasoning in Laatsu I understands separationism and public secularism as a common European asset, which is obviously false.

Recently I was kindly invited to attend a seminar where Françoise Tulkens held a lecture on the subject of the impartiality of the state after Laatsu II. The seminar was organised by The Perelman Institute of Philosophy of Law and the Institute of European Studies (at the Université Libre de Bruxelles) in cooperation with the Centre d’Action Laïque. Something struck me in the statement of Tulkens. She persisted in the affirmation that until Laatsu II there had been a consensus (she did not say a ‘European’ consensus, but a consensus within the ECHR) about the "principle of laïcité" and about the duty to state neutrality. When she explained what she referred to as "laïcité" it appeared to be a plurality of things, some of which are accepted principles under the Convention, but not all of them are. She mentioned the freedom of and from religion; respect for pluralism in education; respect for the convictions of the parents, and also the duty of impartiality and neutrality. But the problem is that the ‘robust’ concept of state neutrality understood as a requisite to achieving impartiality as it is developed in Laatsu I, is tending toward the concept of laïcité as it is understood in France where it is enshrined in the constitution and where it implies a clear separation between religion and the state. That is not a constitutional arrangement about which there is a consensus in Europe, to say the least. Quite to the contrary, laïcité in that meaning is clearly a minority position in Europe. In many European countries including Belgium, the Netherlands, Germany or England, the plea in favour of such a robust separationist stance is also a (perfectly legitimate) militant position, an ideological choice of citizens who want that in their country religion and the state become less entangled and that the state stops any funding that directly or indirectly serves the advancement of religion. And in that militant sense the separationist position is not neutral, as Joseph Weiler and the ECLI rightly underscored. Judge Tulkens seems also rather critical about the margin of appreciation doctrine. 85 She points out that

82 Lord Hoffmann, supra note 31, at 26.
this doctrine could possibly result in lower standards of human rights protection and in a "de jure and de facto abdication of the responsibility of the judge". 46 In her Brussels statement Tulkens made an interesting distinction in that respect between a doctrine of judicial construction trying to influence the factual level of consensus starting from a strong normative rights conception and an alternative doctrine which does the opposite and accepts a wide margin of appreciation for the states when the question at hand is controversial in Europe. The first position, which I will call 'activist', assigns normative priority to (a civil libertarian interpretation of) human rights principles. When state practice does not conform to this ideal, it should be sanctioned and reformed. 47

That position is symptomatic of the way some judges and legal academics specialised in human rights think. They do not think politically even in political matters. Or more accurately, they are in denial that certain legal matters are also highly political and they especially do not want to admit that their own legal thinking about these matters has political consequences, even if it obviously has. The consequence is that they are inclined not to defer the political judgements to the competent and democratically accountable bodies, as they should. They rather conceal their own political judgements behind highly sophisticated 'rights talk'. They achieve this by reasoning out of a frame of reference where rights naturally trump the majority will expressed through the legislator. To put it in a slightly exaggerated way: counter-majoritarianism is their credo. But this counter-majoritarianism is denying its political nature behind a façade of a self-declared 'highly principled' 'rights-based constitutionalism' that should be upheld according to the activists regardless of political dissensus amongst the European countries. 48

Now let there be no misunderstanding about this: of course the curtailing of the will of majorities is inherently linked to the protection of human rights and it is to the credit of judges when they courageously issue these counter-majoritarian judgements each time when it is necessary and legitimate under the Convention. But sometimes activists tend to forget that this is not always necessary and that individuals or minorities are not necessarily always right, however noble their protection may be in many cases. There is even a more important reason why the heralds of counter-majoritarian "rights-based constitutionalism" would be well advised to exercise a little bit more self-restraint. And that is the plain fact that there is no basis in international law to invent new rights and obligations that are too far removed from the basic meaning of the wording of the Convention, especially when there is no consensus about these alleged rights and obligations among the state parties.

In such cases when the rights of individuals are restricted in a modest way on the ground of legitimate countervailing interests, a policy of judicial activism that tramples on the will of the majority is not only unwarranted by the Convention, it is also not in the interest of the Court, for it will undermine its legitimacy. Especially when it comes to the assessment of constitutional arrangements and legal rules that are based on national customs or that are the result of painful political compromising, the Court should take an attitude of judicial restraint. It should then restrict itself to a modest role of a linesman who controls whether the state not crosses the lower limit of human rights protection in the light of the relevant criteria for assessing the acceptability of human rights restrictions (legality, proportionality, necessity in a democratic society in order to guarantee the rights of others or to maintain public order, security, etc.).

The doctrine of the margin of appreciation is not only a pragmatic instrument of deference to the state authorities in matters of expedience, when the local authorities are better equipped to acquire knowledge of the needs of the society and in order for the Court to avoid too much protest and the
concomitant loss of legitimacy. In my opinion it is also a doctrine that should be embraced for normative reasons. The role of the supranational jurisdic-
tional sovereign, who dictates uniform arrangements to states which do not want them, does not fit the Court. The subsidiary nature of the jurisprudence of the Court is twofold. It should not only respect the priority of the national constitutional and legislative bodies, it should also defer to the domestic high-
est and constitutional courts when it comes to determining the specific ways in which the Convention rights are enforced within the national legal order. The greater the constitutional and political diversity throughout Europe is, the wider the margin of appreciation will have to be. And pace the Chamber in Lautsi I, to understand this, one has not even to think politically. For the rea-
son why the ECHR should not try to introduce new rights and obligations when the factual situation among the members of the Council of Europe is one of profound pluralism, is also genuinely legal. It is legal and political because it is related to the very nature of treaty law.

Setting aside some rules of ius cogens (of which the content and the scope are to a certain extent controversial), it is a fundamental principle of positive international law that states can only be bound by the rules they explicitly accept and consented to in treaty provisions. Countries can also be bound through state practice leading to the development of customary international law. Yet they can also contract out of certain developing rules of customary international law by their express and consistent opposition to the formation of these rules. This is because customary international law is itself a derivation of factual state practice. If states do not accept certain treaty provisions and expressly dissociate themselves from the formation of certain rules of custom-
ary international law, they stay outside the binding normative regime of these rules (again, except for ius cogens and the Martens Clause which draw the line of minimal standards of civilized conduct††). Hence the binding force of a treaty is by all means conditional on the prior consent of the state. Treaty law is consensual law and that is the normative reason why the absence of consen-
sus should steer the ECHR toward deference and recognition of a wide mar-
gin of appreciation for the national authorities.

Over the years the Court has consistently held that the Convention should be interpreted as a 'living instrument' which implies that the content and the scope of the Convention rights can evolve, as they have to be interpreted under 'present day conditions'. The need for a certain level of interpretive openness follows also from the abstract and broad formulation of the rights and the concepts in the substantive provisions of the Convention. It is clear that the

right to privacy for example has much wider ramifications in our era of inter-
et and cyberspace than at the time the Convention was drafted. To take another example, the meaning of concepts such as 'cruel punishment' and 'torture' has evolved as the general public has become more sensitive to all kinds of physical and mental abuse of persons by state officials. Therefore it is not surprising that the Court recognises increasingly high standards in the area of protecting essential human rights and fundamental freedoms.†‡ The Court has also been creative in the development of the doctrine of "positive obligations" as these are an implication of Article 1 of the Convention. But the Court also recognizes that there are limits to the 'evolutionary' interpretation of the Convention.†³

In matters about which there are profound differences of opinion between the member states an authoritative Court such as the ECHR that has been set up to give a binding interpretation of the European Convention cannot exceed its own jurisdiction by giving interpretations of human rights which are not clearly warranted by the wording of the treaty and which are rejected by some of the state parties because they constitute a de facto amendment of the Convention which they not only did not choose, but which they reject.†⁴ Therefore the interpretive activity of the Court should have a modest character of judicial restraint with regard to matters about which there is a plurality of legitimate options and no consensus amongst the members of the Council of Europe. And even if there is a growing consensus, that may not be enough to legitimately override the will of some dissenting states when the matter at stake is delicate and rooted in deep moral convictions of a people. Accordingly, the interpretive activity of the Court cannot legitimately have a character of judicial activism that brings the Court to outpace the states by promulgating new obligations that have no basis in the text of the treaty and that lack support in some of the member states. Such an unwarranted amendment of the


†³ In 1986 (Johnson et al. v. Ireland, 18 December 1986, European Court of Human Rights, No. 96978/2) the Court declined to read a right to divorce into the Convention. In 2002 the Court refused to read a right to assisted suicide into the Convention, even if it recognized the right to individual self-determination under Article 8 (Pretty v. UK, 29 April 2002, European Court of Human Rights, No. 25660/03). In 2010 the Court denied that a right to marry for homosex-
ual couples could be read into Article 12 of the Convention and held that this should be left to regulation by the state (Shalk and Kuyf v. Austria, 24 June 2010, European Court of Human Rights, No. 30141/04). Cf. Costa, idem.

†⁴ As a general rule of interpretation, Article 31(1) of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". A special meaning shall only be given to a term "if it is established that the parties so intended" (ibid., Article 31, para. 4).
Convention by means of activist human rights interpretation constitutes a fundamental criticism and even a censure of the domestic constitutional order of one of the member states and an indirect rejection of the principle of democracy within that state. In order to avoid this, the Court should restrict itself in that type of situations to providing minimum standards of human rights protection.

The majority of the members of the Council of Europe had already settled constitutional arrangements concerning the relations between religion and state before they acceded to the treaty. And even if their constitutional frameworks may evolve over time, certainly none of the member states had the intention of putting their pre-existent national traditions and constitutional models at the free disposition of the Strasbourg Court. In ruling that the public school environment in Italy should be entirely secular and devoid of all religious symbolism, the Chamber exceeded its jurisdiction.

In view of these considerations Lautsi II is not a ruling wherein the court capitulates for a ‘holy alliance’ of new ecumenical Christian crusaders, as some suggest. It seems much more accurate to see it as a landmark ruling where the Court reaffirms the limitations and the subsidiary nature of its jurisdiction. The impression that Lautsi II might be illustrative for a new trend seems to be confirmed by at least two other recent rulings of the Court that grant a wide margin of appreciation to the states: A. B. and C. v. Ireland (2010) and S.H. and others v. Austria (2011). In the first case the Court denies that the Irish prohibition of abortion constitutes a violation of the right to private and family life under the Convention (Article 8). Here the Court even went a step further than Lautsi II. For it held that a broad margin of appreciation is to be accorded to the Irish state in determining the right balance between the protection of profound moral values (including the protection of unborn life) and the right to private life under Article 8. The Court granted that wide margin of appreciation regardless of the fact that it recognized the existence of a growing European consensus towards allowing abortion on broader grounds. This confirms the point about the nature of treaty law that I am trying to make here: with their accession to the Convention the Irish never agreed to an understanding of the right to privacy or family life that would imply a right to abortion, which they have always rejected. And it is not for the Court to bully them into the acceptance of such a ‘right’ (even if I personally think that the Irish law on abortion is archaic). Together with four other judges, Ronakis and Tulkens dissented on the ground that the growing European consensus on the

right to abortion overrides the right of the Irish to legislate otherwise. The fact that under Irish law there is still a possibility to lawfully travel abroad for abortion is not an excuse for the dissenters. I think that the argument about the overriding consensus is unacceptable in this case, because it implies that the Irish people would have surrendered their legislative sovereignty on abortion by signing a treaty containing not a single word on that matter. The dissenting judges erroneously think that the ECHR is mandated to act as if it were the Constitutional Court of Europe, empowered to declare ‘unconstitutional’ the Irish anti-abortion legislation in a way analogous to what the US Supreme Court did in Roe v. Wade. Of course I am not contending that Ronakis, Tulkens (and the other dissenting judges) do not know that the ECHR is not a Constitutional Court. What I am arguing is that their doctrine of judicial construction, which is in favour of a strong normative interpretation of the Convention rights, has ‘activist’ consequences. And that may be a doctrine that suits a constitutional Court such as the US Supreme Court but not the ECHR, whose jurisdiction ensues from a treaty that has not mandated the Court to such activist judicial lawmaking.

I think that the activist temptation is drawing on a misleading language that has been increasingly used by scholars in international law. And that is the language about the “European constitutional order”. This language may be justified to a certain extent when speaking of the incremental process of integration of the European Union. And even in that case one should be cautious, as there may potentially arise serious conflicts between EU norms and international constitutional norms, as was exemplified by the ruling on the treaty of Lisbon by the German Constitutional Court. But the concept of a “European constitutional order” is inappropriate when we speak about the Council of Europe which is immensely far removed from being a United States of Europe. The Council of Europe may be qualified as an association of states that aspire to be a community of shared values which are embodied in the Convention. But the plain fact that the Committee of Ministers has been entrusted with supervising the execution of the judgements of the ECHR demonstrates that the Convention system is ultimately a joint political project of the state parties where the Court has an important but subsidiary role.

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19 A. B. and C. v. Ireland, 16 December 2010, European Court of Human Rights (GC), No 25579/05; and S.H. and others v. Austria, 3 November 2011, European Court of Human Rights (GC), No 57813/08.


21 Even that is highly controversial though, and in that respect Roe v. Wade, 410 U.S. 113 (1973), is an excellent example.

XII. CONCLUSION

Rather than a Europe-wide offensive of rechristianisation that is going to crush dissenters, agnostics and atheists, Lausti II has everything to do with a reframing of the scope of jurisdiction of the Court to more realist and modest proportions. With this readjustment the default position in controversial affairs will become judicial restraint and deference to the national legal order, as it should be when there are no grave human rights violations at issue. Such a limitation of jurisdiction has nothing to do with being for or against Christianity because tomorrow it can be just as well invoked to let the French government defend and maintain its robust version of public secularism.

Ronald Dworkin once drew a distinction between two types of judicial restraint: political scepticism and deference. The first denies that individuals have moral rights against the state beyond what is expressly granted to them in the Constitution. The theory of judicial deference assumes that citizens do have such moral rights beyond what the law expressly grants them, but it points out that the character and scope of these rights are debatable and argues that sometimes political institutions rather than courts are competent for deciding which rights should be enforced against the majority and at what cost. When taking this distinction of Dworkin as a reference, my position is not the sceptic one and neither the activist, but the position in favour of deference. As I already mentioned, I think that individuals have rights against the majority and as a general rule “decisions about rights against the majority are not issues that in fairness ought to be left to the majority.” Hence courageous countermajoritarianism is regularly needed in human rights protection. But one should thereby also take into account the nature of the right at stake, the level of seriousness and intensity of a restriction and the reasons for that restriction. That is where the theory of deference comes into play. The case at hand concerned a restriction of the negative right to freedom of conscience (freedom from religion) through the traditional display of the core symbol of the majority religion in public schools, a tradition that is intrinsically linked with the preservation of cultural heritage and collective identity. A maximalist interpretation of the right to freedom from religion that amounts to a claim to be spared at any time of the contemplation of exterior manifestations of the majority religion, even when one is not coerced in words or deeds to embrace that religion and stays otherwise free to reject it or to embrace another religion, to be agnostic or atheist, is no longer a form of necessary protection of individuals or minorities against the tyranny of the majority. It is rather a manifestation of a potential tyranny of the minority and an indication of intolerance as well as of a low frustration threshold. Even if it cannot be denied that the crucifix objectively creates the impression that the state identifies itself to a certain extent with one particular religion, “the core question is… whether it does so to an extent that justifies the finding of a breach of the Convention,” as Judge Rozakis pertinent writes in his concurring opinion in Lausti II. With its judgement that there is no evidence that such a violation exists in the Lausti case, the Grand Chamber wisely returned to a modest operational mode of judicial restraint from which the Chamber judgement constituted a departure in breach of the subsidiary nature of its jurisdiction. In controversial cases such as this one, it is always necessary to go back to the exact wording of the Convention. When one does that, it is crystal clear that Article 9 of the European Convention and Article 2 of Protocol I do not prohibit a state church; that they do not oblige and neither prohibit the parties to embrace a separation of church and state or laïcité. The state does not even have to be religiously neutral. Compelling under the Convention is merely that the state should guarantee freedom of conscience and religion, should not indoctrinate children, and should respect the pedagogical freedom of the parents. As Judge Bonello correctly underscores in his concurring harangue: all the rest, such as laïcité, separation of church and state, neutrality conceived as equidistance etc., are optional constitutional arrangements which a state can invest in or not and should be left over to the national, democratically legitimated legislative bodies. There is no mention of them in the Convention and they are not necessary constitutive elements of the freedom of conscience and religion. This should be admitted, even by public secularists (such as myself) who are sincerely convinced that the place of the crucifix is either in the church or in a private place, but not in the classrooms of the public school. Although this may sound a bit like an inner conflict, it is no inconsistency. Quite to the contrary, it is an insight that results from an analytical distinction between a personal conviction and what is de iure binding under the European Convention of Human Rights, which is not a treaty that has been drafted to erase the proud European constitutional and cultural diversity.

For a plea in favour of deferential judicial review and the margin of appreciation as general instruments for preventing conflicts between different levels of jurisdiction, see J. Geraeds, “Pluralism, Deference and the Margin of Appreciation Doctrine,” 171 European Law Journal (2011), pp. 80-120.


Ibid., at p. 142.