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## NEGATIVE FREEDOM OF RELIGION AND SECULAR VIEWS IN LIGHT OF THE CASE OF *LAUTSI VS. ITALY*

### I. INTRODUCTORY COMMENTS

This paper\* focuses on something that by many Christians has been considered to be a manifestation of intolerance towards them and an action limiting their religious freedom, where the law itself is identified as the very source of intolerance. Even though, it is the same law that protects human rights and that has been designed to serve as the means of preventing religious intolerance.

Soile Lautsi, an Italian citizen of Finnish origin, filed a case on 27 July 2006 with the European Court of Human Rights, in her own name and on her children's behalf against the Republic of Italy. She challenged the practice of placing crucifixes in the classrooms of Italy's state school attended by her children as contrary to the principle of secularism, according to which she intended to bring up her children. In her view, this practice violated her right to raise and teach her children according to her own religious and philosophical (moral)<sup>1</sup>

\*A more extensive version of this paper is published in Polish "Negatywna wolność religijna i przekonania sekularystyczne w świetle sprawy Lautsi przeciwko Włochom", *Przegląd Sejmowy* 2011, No. 5(105), p. 37-68, © Wydawnictwo Sejmowe.

<sup>1</sup> See *Lautsi against Italy*, app. 30814/06, judgment of 3 November 2009, further as *Lautsi*, § 30. For a Polish translation of the judgment, see *Biuletyn — Biuro Informacji Rady Europy* [Bulletin — Information Office of the European Council) 2009 # 4 Selection of Ruling of the European Court of Human Rights in Polish Cases, Publ. Scholar, Warsaw 2009, p. 16—30. Compare R Borecki, D. Pudzianowska, "Obligatoryjność ekspozycji symbolu religijnego a wolność w sprawach wyznaniowych. Komentarz

convictions,<sup>2</sup> guaranteed by Article 2 of the first Protocol to *the Convention for the Protection of Human Rights and Fundamental Freedoms*, and is a violation of the religious freedom guaranteed by Article 9 of the *Convention*.

The ruling of the chamber composed of seven judges was announced on 3 November 2009. The matter became well known and has since been called "the Italian Crucifix Case."<sup>3</sup> The ECHR found that "the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe."<sup>4</sup> The ECHR declared that such limitations to rights are incompatible with the responsibility of the state to maintain the neutrality of State authority, especially in the area of education.<sup>5</sup> The ECHR recognised the violation of Article 2 (right to education) of Protocol No. 1, in relation to Article 9 (freedom of thought, conscience, and faith) of the *Convention*. The judgment was unanimous and none of the judges added any comments to it.<sup>6</sup> The ECHR has concluded that there is no reason to consider the matter also raised by the applicant, of violation of Article 14 (Prohibition of discrimination) of the *Convention*.

do wyroku ETPCz w sprawie Lautsi p. Włochom" (Obligatory Display of Religious Symbols vs. Freedom of Religious Beliefs in Cases of the Issues of Faith, Commentary to the Ruling by ECHR in the Case of Lautsi vs. Italy), p. 5-15.

<sup>2</sup>Compare *Lautsi*, §§ 3, 7, 27.

<sup>3</sup>Strictly speaking, a crucifix is a Latin cross with the image of Christ. The issue whether it is the crucifix or just a sign of a cross was not regarded as essential in the arguments of the ECHR. The display of the likeness of a suffering Christ was significant in the remarks prepared by the European Humanist Federation that had not gained the status of the third party, to *Lautsi vs. Italy*, Third party intervention by the European Humanist Federation, 23 May 2010, <http://www.humanistfederation.eu/download/277-EHF%20cov%20ltr%20to%20ECHR%20re%20Lautsi.pdf>.

<sup>4</sup>*Lautsi*, § 57.

<sup>5</sup>*Ibid*.

<sup>6</sup>The judgment was issued by the following judges: Françoise Tulkens (Chair), Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danute Jociene, Dragoljub Popovic, Andras Sajó, and Isil Karakas.

The Italian government<sup>7</sup> lodged an application in line with the provisions of Article 43 of the *Convention* to forward the case to the Grand Chamber. It was admitted and on 30 June 2010 a Special Session of the Grand Chamber consisting of 17 judges was held.<sup>8</sup> The judgment of the Grand Chamber was announced on 18 March 2011.<sup>9</sup> With majority of votes — 15 in favour and 2 against — the ECHR found that there was no violation of Article 2 of Protocol No. 1, and that there were no additional issues in connection with Article 9 of the *Convention*. The ECHR unanimously concluded that there was no reason to recognise the complaint on grounds of a violation referred to in Article 14.

This paper is intended, on the one hand, to present the Lautsi case; and on the other, to analyse the argumentation with particular emphasis placed on the issues of the negative freedom of religion and secular beliefs. It is argued that the argument of the Grand Chamber advocating for the protection of a radically interpreted religious freedom, as well as the arguments of both the Chamber and the Grand Chamber advocating for the protection of secular views as defined by the applicant, is unfounded and may be regarded as the propagation of religious intolerance, and thus regarded as a threat to the freedom of public manifestation of religious and philosophical convictions protected by Article 9 of the *Convention*.

## II. ARGUMENTS OF THE APPLICANT

The main complaint was an objection that placing the sign of a cross in the classrooms of Italian State schools contradicts the principle of secularism, which was considered by the applicant to be a part of

<sup>7</sup>Dated 28 January 2010.

<sup>8</sup>A complete recording of the session is available on the ECHR Internet page: [http://www.echr.coe.int/ECHR/Header/Press/Multimedia?Webcast+s+of+public+hearings/webcastEN\\_media?&p\\_url=201000630-l/en/](http://www.echr.coe.int/ECHR/Header/Press/Multimedia?Webcast+s+of+public+hearings/webcastEN_media?&p_url=201000630-l/en/)), and I will refer to the English version of the recording throughout this paper.

<sup>9</sup>Further referred to as *Lautsi GCh*.

her philosophical convictions according to which she wanted to raise her children. The applicant claimed that the display of crucifixes in the classrooms of Italian State schools violated her right to raise her children and have them educated in accordance with her religious and philosophical convictions, and was a violation of the right to freedom of beliefs and religion.<sup>10</sup>

The applicant further claimed that the sign of a cross was primarily a symbol of religious nature.<sup>11</sup> Where "by requiring the crucifix to be displayed in classrooms the State was granting the Catholic Church a privileged position,"<sup>12</sup> which contradicted the principle of secularism. In the applicant's opinion "Favouring one religion by the display of a symbol gave state-school pupils - including the applicant's children - the feeling that the State adhered to a particular religious belief, whereas, in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth,"<sup>13</sup> and consequently as being "closer to some citizens than to others."<sup>14</sup> One could say that by arguing in favour of the right to secularism, the applicant drew on the rule of law, however apart from the argument contained in the fragment quoted above, that issue was not raised.

### Secularism as a type of philosophical conviction and belief

It must be emphasised here that the applicant's arguments did not contain a complaint that the state violated her and her children's rights as non-believers. Of course, by referring to the pressure that — in her opinion — was put on her children by the presence of a crucifix, she pointed out that this situation indicates that "the State

was estranged from those who did not share Christian beliefs," and has argued that the "concept of secularism required the State to be neutral and keep an equal distance from all religions, as it should not be perceived as being closer to some citizens than to others."<sup>15</sup> The applicant did not demand that her children should be able to remain loyal to their non-Christian beliefs. The principal point of reference was not a directly negative aspect of religious freedom (being the freedom of not following any religion), but rather secularism as a certain philosophical viewpoint.

This matter was further addressed by Nicolo Paoletti, representing the applicant, in his arguments on 30 June 2010 during the hearing in Grand Chamber. He argued that the applicant — based on her beliefs according to which she wanted to raise her children — was a "secular person."<sup>16</sup> The word-to-word translation of a "lay person" would be here, certainly, inappropriate. It is not to say that S. Lautsi did not belong to a convent, or that she was not a spiritual person, but that she had some convictions of how a state should act; in other words that the state should not take up actions that suggest its preference for a particular religion. Actions that could make people feel that the state is closer to this or that religion. In order to reflect the meaning of the term "secular person" in the context discussed here, one could suggest such terms as "secularist." Nicolo Paoletti used the term "secular person" in contexts analogous to those in which "believer", "agnostic", and "atheist" are used. He emphasised that he had not asked Soile Lautsi, whom he represented, about her religious beliefs, and that they were absolutely irrelevant to the resolution of this case. The line of argumentation chosen by the applicant allowed her to pursue the rights she was entitled to through the right of religious freedom without the necessity of revealing her own religious beliefs. The applicant was against placing the sign of a cross in classrooms not because it

<sup>10</sup>*Lautsi*, § 3.

<sup>11</sup>*Lautsi*, § 31.

<sup>12</sup>*Lautsi*, § 30.

<sup>13</sup>*Lautsi*, § 31.

<sup>14</sup>*Lautsi*, § 32.

<sup>15</sup>*Ibid*.

<sup>16</sup><http://www.echr.coe>, the 10th to 11th minute of the recording from the hearing on 30 July 2010.

infringed on her atheistic or agnostic principles, but on her secular beliefs. It was not the issue of protecting the basic negative aspect of religious freedom,<sup>17</sup> which is the right to not following any religion, to being an atheist or an agnostic, but rather the right to hold beliefs related to how a state should act.

Apparently, the ECHR did not completely take this into consideration, by acknowledging in its summary of complaints that "the applicant alleged that the symbol [of the cross] conflicted with her convictions and infringed her children's right not to profess Catholicism."<sup>18</sup> Her children's right not to practice Catholicism is just one of many elements of the right to being a secular person. The applicant would probably agree with the fact that her children's rights were infringed in such a sense that the actions violating the right not to adhere to the Catholic faith are simultaneously actions challenging the principle of secularism.

In summary, the school practice of displaying crucifixes in every classroom was not as much contrary to the applicant's and her children's atheistic or agnostic beliefs, as it was contrary to the principle of secularism of the state, according to which she wanted to raise her children. And to the core of this principle is that the state's actions should not give preferential treatment to any religion, through, in particular, any of its actions that would lead it to be perceived as a follower of a given religious belief, and thus being more distant from those who do not share in this approach.

In the applicant's view, the privilege granted to the Catholic Church by the State by the placing of the cross in classrooms constituted:

<sup>17</sup>This kind of interpreting the negative aspect of religious freedom was also taken by the ECHR in § 47 (e) of the judgment: "the freedom to believe and the freedom not to believe (negative freedom) are both protected by Article 9 of the Convention."

<sup>18</sup>Lautsi, § 53. The applicant challenged the violation of Article 14, stating that there was discrimination against those who did not follow Catholicism (*Lautsi*, § 30, see below); however, the discrimination of non-Catholics did not have to be connected with the violation of religious freedom, nor — in particular — with the violation of the right not to be a Catholic.

[1] a violation of her right to raise children in compliance with her moral and religious convictions, guaranteed by Article 2 of Protocol 1 to the *Convention*;

[2] a violation of her and her children's right to the freedom of thought, conscience and religion guaranteed by Article 9 of the *Convention*;

[3] a form of discrimination against those who do not practice the Catholic faith and thus a violation of Article 14 of the *Convention*.

### III. ARGUMENTS OF THE RESPONDENT STATE

#### 1, Introductory comments

The Italian State's argumentation, which was taken into account by the ECHR during the preparation of the judgment of 3 November 2009, aimed at proving that the Italian State is a secular state that respects the principle of secularism; a crucifix is not only a religious symbol, and that as a non-religious symbol (although of religious origin) it has a place in the functions of the state (at schools). Because the shaping of the state activities in the space of culture and tradition fits within the margin of appreciation of a particular state, thus the relationship of the Italian State to the crucifix as a symbol of the sphere of culture and tradition is also a matter that fits in that margin. In addition, Italy referred to political factors that warranted the state's actions with regard to the display of crosses in state schools.

#### 2. Italian State as a secular state

Arguing that the Italian State recognises and respects the principle of secularism, Italy pointed out that the constitutional rights of equality of all its citizens — independently of religious beliefs and equality before the law in respect of the freedom of religion — require that the state take on the approach of "equidistance" and impartiality on the issues involving religion; regardless of the number of believers or

the significance and the magnitude of social responses to the violations of the believers' rights within particular religions.<sup>19</sup>

Equal protection of every person who belongs to whichever religion is independent of the religion that a person has chosen. Nevertheless, this rule is not contradicting the possibility of regulating in different ways the relationship between the state and different religions.<sup>20</sup> The high position ascribed in Italian legal order to the attitude of "equidistance" and impartiality reflects the principle of secularism, also regarded directly by the Italian Constitutional Court as the highest principle.<sup>21</sup> The consequence of recognising the principle of secularism is the perception of the state as a "pluralistic reality," in which "the various religions, cultures and traditions must coexist in equality and freedom,"<sup>22</sup> and where the religious character of the state has been directly rejected.<sup>23</sup>

### 3. The non-religious character of the cross as a symbol

In light of the judgments of the Italian courts and the arguments of the Italian government, the cross hung in state schools should not be treated as a religious symbol but rather as:

- a symbol of the Italian State;<sup>24</sup>
- a symbol of Italian history and culture, and thus of Italian identity;<sup>25</sup>
- a symbol of the principles of equality, freedom, and tolerance as well as the secular foundation of the state;<sup>26</sup>
- a symbol of ethical values, such as: not using force, equality, equal dignity of all people, justice and sharing with others, primacy of

<sup>19</sup>*Lautsi*, § 24.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup>*Lautsi*, § 25.

<sup>24</sup>*Lautsi*, § 11.

<sup>25</sup>*Lautsi*, § 13.

<sup>26</sup> *Ibid.*

the individual before a group, freedom of choice, separation of politics from religion, and love of all people extending to the forgiveness for one's enemies;<sup>27</sup>

— a symbol of democratic values embedded in evangelical teachings;<sup>28</sup>

— a symbol of humanist values recognised also by people who are not Christians.<sup>29</sup>

According to the Italian government, the crucifix has been recognised in Italy as a secular value of the Italian Constitution and a representation of the civic life.<sup>30</sup>

The crucifix is thus present in the state's activities as a non-religious symbol, and "as the symbol of the cross could be perceived as devoid of religious significance, its display in a public place did not in itself constitute an infringement of the rights and freedoms guaranteed by the Convention."<sup>31</sup>

### 4. Margin of appreciation

The Italian government also argued that the right to placing crosses in public schools fits within the margin of appreciation to which states-parties to the *Convention* are entitled. It pointed out two principles which are already well established in the ECHR case-law. That is:

— a broad margin of appreciation that states have in the delicate issues related to culture and history;<sup>32</sup>

— a margin of appreciation in areas in which there is a lack of consensus among the parties to the *Convention* in issues related to a state's implementation of the principle of secularism.<sup>33</sup>

<sup>27</sup>*Lautsi*, § 35.

<sup>28</sup> *Ibid.*

<sup>29</sup>*Lautsi*, §40.

<sup>30</sup>*Lautsi*, §15.

<sup>31</sup>*Lautsi*, §35.

<sup>32</sup>*Lautsi*, §38.

<sup>33</sup>*Lautsi*, § 41.

With respect to the margin of appreciation, Nicolo Paoletti, who represented the applicant in the Grand Chamber, argued that the regulation of admissibility of the cross placement in private schools belongs, maybe, to the government, whereas in state schools the matter should be strictly based on the principle of secularism.<sup>34</sup> Natalia Paoletti, who also represented the applicant in the Grand Chamber on 30 June 2010, argued, ignoring the meaning of the word "consensus" and some elementary rules of logic, that there is consensus with respect to using the principle of secularism because only 8 out of 47 states that belong to the Council of Europe do not follow this principle in the way it should, in her opinion, be followed.

However, the practices of many member states within the Council of Europe are far different from the supposed ideal dictated by the principle of secularism, according to which the states were not to favour any religion. As a matter of fact, many states have a preference for a certain religion, either through recognising it to be its official religion or by favouring references to a particular religion in their constitutions and founding documents. In a number of countries crucifixes or crosses are displayed in state schools or courts; in others, religion classes remain a compulsory part of the curriculum (allowing partial or full release of a single pupil from taking the classes).<sup>35</sup>

These kinds of practices by the member states of the Council of Europe have not only remained unquestioned but in some instances were even directly considered admissible in the Strasbourg case-law.<sup>36</sup>

<sup>34</sup>"You can say that in private schools you can hang crucifixes (...). This would fall within the margin of appreciation of the state but not in public state schools"; 12th minute of the recording from the hearing on 30 July 2010, <http://www.echr.coe>.

<sup>35</sup> Compare to the *Legal Memorandum Lautsi v. Italy* prepared by the European Centre for Law and Justice (ECLJ) — the organization that received the status of the third party in the Grand Chamber — April 2010 (available on <http://www.ecjl.org>), § I.A.

<sup>36</sup>ECLJ, *Legal Memorandum*, § I. A.

## 5. Political rationale

As justification for the defense arguments, the Italian State also included the need for compromise with Christian parties that represent a significant part of society and its religious beliefs.<sup>37</sup> Assuming that the reason for the compromise was the desire for effective leadership, one must agree that the displaying of a cross in state activities also has an instrumental character, unrelated to the symbology of the cross.

## 6. Plausible counterarguments

Italy's argumentation did not aim at justifying the admissibility of the presence of religious symbols in state activities, nor did it aim at showing that the state's activities involving the display of religious symbols in state schools do not infringe on the principle of secularism. The main arguments were based on the acknowledgment that the cross is not only a religious symbol, and that as a non-religious symbol it has been used in state activities. In other words, the reasons for placing crosses in school classrooms do not have a religious connotation. Hence the state actions cannot be interpreted as the indication that the state is "closer to or more distant from" a particular religion, but rather they should be viewed as a sign pointing to the preference of some elements of tradition and culture in a general sense.

In order to refute the state's argumentation, one has to prove that the cross is primarily a religious symbol. The applicant — as well as the state — agreed that the state should not act in a way that might be interpreted as acting in direct connection to something that was religious in nature. This precept was accepted by both sides on different grounds: by the Italian State based on the principle of secularism recognised in the domestic Italian legal order; and by the applicant based on the principle of secularism recognised as an essential element of protected beliefs by Article 9 of the *Convention* and by Article 2 of

<sup>37</sup> *Lautsi*, § 42.

Protocol No. 1, or as a principle integrally related to other basic legal principles such as, for example, the principle of the rule of law.

#### IV. ARGUMENTATION OF THE CHAMBER

##### 1. The principles adopted by the ECHR

While formulating the principles that are essential for resolving this case, the ECHR formulated the following:

(a) Each of the two sentences in Article 2 of Protocol No. 1 must be interpreted in light of the other, and also — in particular — in light of Article 8 (a right to respect for family and private life), Article 9 (freedom of thought, conscience, and religion), and Article 10 (freedom of expression).<sup>38</sup>

(b) Within the right to education is embedded the right of parents to have their religious and philosophical convictions respected.<sup>39</sup> In Article 2 of Protocol No. 1, "the first sentence does not distinguish, any more than the second, between State and private teaching."<sup>40</sup> It is hard to find a different reason for turning attention to this rule in the context of the matter under ECHR's examination than the fact that it is unnecessary to recognise the differentiation between state and private education, according to the point of view expressed in Article 2 of Protocol No. 1; and consequently, to identify the theoretical foundation for the further assumed generalised concept of negative freedom of religion, that is being used not only in the context of state education.

The second sentence in Article 2 in Protocol No. 1 aims — according to the Court — "at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the 'democratic society'."<sup>41</sup>

<sup>38</sup> *Lautsi*, § 47 (a).

<sup>39</sup> *Lautsi*, § 47 (b).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

(c) The respect for parental beliefs demands "an open school environment" to encourage inclusion rather than exclusion<sup>42</sup> independently of religious beliefs. Hence, "Schools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions."<sup>43</sup>

(d) The second sentence in Article 2 of Protocol No. 1 assumes that the State, along with the duties concerning an overall shape of the curricula, also has duties concerning the way of delivering the information (knowledge) in schools. Thus, with regard to ensuring a proper character of the very process of teaching, the state should care "that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner."<sup>44</sup> Indoctrination is unacceptable since it could be construed as disrespectful of the religious and philosophical convictions.<sup>45</sup>

(e) The respect for religious beliefs of the parents assumes a right to follow a given religion, as well as a right not to follow any religion, both of which are protected by Article 9, and the latter was given a name by the ECHR as the "negative freedom".<sup>46</sup>

In the summary of the principles it had followed, the ECHR acknowledged that "the state's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions."<sup>47</sup> By assuming this stance, it is possible to issue a direct prohibition of actions taken by the state of any kind that might differentiate any religion. Thus, the ECHR recognised the principle of secularism as binding and accepted — essentially — the view of secularism taken by the applicant.

<sup>42</sup> *Lautsi*, § 47 (c).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Lautsi*, § 47 (d), see also there § 49.

<sup>45</sup> *Lautsi*, § 47(d).

<sup>46</sup> *Lautsi*, § 47 (e).

<sup>47</sup> *Ibid.*

## 2. Circumstances considered as relevant by the ECHR

The ECHR considered as significant circumstances for the resolution of this case that the state's activities influence people who, due to their age, do not have a fully developed ability to think critically, and that in a school environment a child is in a position of great dependence on the power of the state as it is represented by the school.<sup>48</sup> One could question here whether from a child's point of view the school does, indeed, seem to be a representative of the state's authority. Perhaps one could justly presume that the sense of a pupil's dependence on the school does not differ much for either state or private schools. These questions have not been further evaluated. However, it is a fundamental matter — keeping in mind that secularism is concerned with the actions of the state — that the actions of the school authorities are viewed — by the children — as synonymous with the actions of the state.

Besides, the ECHR underscored that the impact of the symbol of the cross on the pupils in schools was of compulsory character. That is, during daily school activities it was impossible not to notice the cross, and it was thus regarded as a "powerful symbol".<sup>49</sup> The determination whether the impact of the cross has a compulsory character is essential from the ECHR's point of view and was essential in the judgment of 29 June 2007 in the case *Forgero vs. Norway* (app. 15472/02), in which the coercion was an important circumstance.

## 3. Formulation of the main problem

In order to resolve the case the ECHR considered two issues as key.

Whether the state's ordering to hang crucifixes in school classrooms:

[1] ensured that when its life-forming and educational responsibilities were being carried out, knowledge was delivered in an objective, critical, and pluralistic manner,

<sup>48</sup> *Lautsi*, § 48.

<sup>49</sup> *Lautsi*, § 54; The ECHR is referring to the case of *Dahlab vs. Switzerland*, app. 42393/98, decision on admissibility of 15 February 2001.

and

[2] respected the parents' religious and philosophical convictions.<sup>50</sup>

In light of the first question, the presence of the cross was analysed not from the point of view that it is a symbol with a religious character, but rather from the point of view of the influence of the presence of the cross on *the manner of delivering knowledge*; whether the presence of the cross did not violate the duty of the state to secure an objective, critical, and pluralistic way of presenting information. The first question was constructed by the ECHR specifically to expose the violation of the right to education (Article 2 of Protocol No. 1), and not of the right to freedom of religion. The state has an obligation to guarantee that education, be it in state or private schools, complies with certain standards, including the above-mentioned standard of the manner of delivering knowledge. Compliance with that standard should be enforced by the state also in the non-state schools. If it is concluded that the presence of the cross is disruptive to the desired way of delivering knowledge, then the duty of the state must be to ensure that all pupils, not only those in state schools, must be provided with the school environment supporting the adherence to the desired standard, in order for the education to proceed in an objective, critical, and pluralistic manner, i.e. in a school environment devoid of religious symbols. This line of thinking will be even more relevant since among the general principles the ECHR included the principle advising to interpret Article 2 of Protocol No. 1 as pertaining to education both in state and private schools.

The examination of the compliance with the obligation to deliver knowledge in an objective, critical, and pluralistic manner, is conducted with the principle of secularism in mind. Therefore the ECHR should have proceeded with justifying the thesis that the duty to deliver knowledge in an objective, critical, and pluralistic way had been infringed upon by "the display of the crucifix as a sign that the

<sup>50</sup> *Lautsi*, § 49.



state takes the side of Catholicism,"<sup>51</sup> and is hence "closer" to some but not to the others. As it turned out, the ECHR's argumentation was directed towards justifying a much more general thesis that the presence of the cross in a school environment disrupts the delivery of knowledge in an objective, critical, and pluralistic manner because it violates pupils' negative freedom of religion. In this case the concept of negative freedom of religion was understood as the right to a space free of religious symbols which is different from the understanding of that concept assumed in the process of formulating the principles.

#### 4. Response to the second question

While preparing to answer the second question, the ECHR stated that even though the crucifix as a symbol has — according to the claims of the Italian State — many meanings of non-religious character; yet — contrary to what the Italian State claims — it bears a primarily religious meaning which it does not lose in a public space.<sup>52</sup> The recognition of the religious meaning as the dominant one in the sign of a cross forms the basis to the conclusion that the applicant's perception of this sign as an expression of the state's siding with Catholicism was not arbitrary and had objective grounds.<sup>53</sup> Therefore, the displaying of the sign of a cross by the state violated her secular beliefs according to which she wanted to raise her children. Consequently, an affirmative response to the second question follows: the state did not respect parents' religious and philosophical convictions by placing the sign of a cross in classrooms.

#### 5. Response to the first question

A much more complicated argumentative structure will be required in the response to the first question, and in doing so certain

<sup>51</sup> *Lautsi*, § 53.

<sup>52</sup> *Lautsi*, §§51-52.

<sup>53</sup> *Lautsi*, § 55.

determinations will be made concerning religious freedom. The ECHR's key arguments on the issue raised in the first question are as follows:<sup>54</sup>

[1] The cross may be rightfully interpreted by pupils as a religious sign.

[2] Because of that pupils may feel that they are being educated in a school environment marked by a certain religion.

[3] This kind of perception may be supportive of the pupils adhering to a given religion, however it may also pose an emotional distress — "may be emotionally disturbing" — to pupils following another religion or to those pupils who are not religious at all, especially when among them are pupils belonging to religious minorities.

[4] Such emotional hardship resulting from the presence of religious symbols is unacceptable in light of the negative freedom of religion, the violation of which is manifested by those displays.

[5] Hence, by placing crosses in classrooms the state violated the responsibility to perform its educational functions and obligations in an objective, critical, and pluralistic manner.

### V. STRUCTURE ANALYSIS OF ECHR'S ARGUMENTS

#### 1. Religious symbols in the school environment as an emotional hardship to pupils

The first three steps are in themselves findings that undoubtedly confirm a certain possibility that cannot be disregarded. The ECHR considered to a greater extent the third step containing the premise that the feeling that a school environment is marked by a certain religion and may support those pupils who adhere to it, may pose an emotional hardship on pupils adhering to a different religion or those who do not adhere to any religion.

The introduction into the process of upbringing and education of an unnecessary(unjustified) emotional hardship (and directed only at

<sup>54</sup> *Lautsi*, §§ 55-56.

a certain group of pupils) might be of itself unacceptable as affecting the manner in which knowledge is delivered and as complicating the fulfilment of the duty to deliver knowledge in an objective, critical, and pluralistic manner. However, in the analysed case it is not just the emotional distress as such, but rather an emotional distress that moulds the religious or philosophical convictions.

The issue raised by the ECHR needs to be clearly distinguished from a more general one: whether the presence of a cross introduces in the upbringing and education of a child some unnecessary (unjustified) emotional distress (and directed only at a certain group of pupils) through the mere message contained in the symbol of a cross, or through the impact of a crucifix not as a symbol but rather as the likeness of a tortured human being.<sup>55</sup> Of course, a suspicion of such emotional hardship might have also been raised before the Court as affecting the manner in which knowledge is delivered and complicate the fulfilment of the duty to deliver knowledge in an objective, critical and pluralistic manner. It is definitely a different problem from the one raised by the ECHR that analysed the issue from the point of view of secularism — it is not just the religious message in the symbol of a cross, nor the crucifix as a likeness of a tortured human being that were considered to be the source of emotional distress in pupils, but rather the emotional distress caused by the fact that pupils perceive the State as siding with a certain religion, or that pupils view the school environment as marked by a given religion.

The ECHR, in reference to the *Dahlab* case perceived the cross, similarly to the Islamic head cover, as a "powerful external symbol" affecting everyone around.<sup>56</sup> In the case of *Dahlab*, the ECHR concluded that Switzerland was in a position to recognise — considering the circumstances — the Islamic head cover as a "powerful external

<sup>55</sup> This issue was raised in comments submitted by the European Humanist Federation which did not receive the status of the third party in the proceedings of the Great Chamber; see also *Lautsi v. Italy: Third-Party Intervention by the European Humanist Federation*, 23 May 2010, [www.humanistfederation.eu](http://www.humanistfederation.eu).

<sup>56</sup> *Lautsi*, § 54.

symbol" and unacceptable, because the displaying of it by a teacher was indicative of proselytising.<sup>57</sup> According to the ECHR, the mere recognition of it as a "powerful external symbol" did not seal its fate as inadmissible in the public sphere. The critical circumstance was that the symbol had been shown by the teacher to a group of children whose ages ranged from 4 to 8 years.

It must be emphasised that one of the significant differences between the *Lautsi* and *Dahlab* cases was that in the latter case it was not the ECHR that was in a position to recognise the head cover as such a symbol. The ECHR decided that in doing so the state did not cross the margin of appreciation and that it belonged within the state's power. It was the Grand Chamber in its judgment of 18 March 2011<sup>58</sup> that pointed out to this important difference between these two cases, which consequently ruled out the admissibility of argumentation based on the *Dahlab* case.

In the process of reviewing the Soile Lautsi claim from the point of view of the violation of the principle of secularism, it must be noted that the ECHR did not question the possibility of children's recognising some of the school actions as the actions of the state. If children can relatively easily identify the sign of a cross as a religious symbol, assuming — as the ECHR did — that both the criticism and objectivity are limited at their age, then one may suppose that children may have great difficulty in identifying specific activities on the school grounds as the actions of the state. Whereas such identification is a necessary condition in order for the children to become aware of the violation of the principle of secularism, and, as consequence of that, feel discomfort due to the lack to respect for secular beliefs. Therefore, it is justified to assume that in the child's eyes it is not important whether the school environment has been created by persons acting as state employees, or pursuant to the rules governing the state schools, or whether it was created within the framework of a non-state educational system.

<sup>57</sup> *Dahlab*, § 2.

<sup>58</sup> See *Lautsi GCh*, § 73; and also see ECLI, *Legal Memorandum*, LA.

On the other hand, it was consistent in the ECHR approach to assume such a stance on the question of negative freedom of religion that makes the formulated postulates applicable not only to state schools. The state is being perceived not so much as a subject displaying religious symbols and directly threatening the negative freedom of religion, but rather as a subject obliged to ensure that religious symbols in the school environment are not displayed, thus as a guarantor of the negative freedom of religion.

## 2. Further definition of the concept of negative freedom of religion

The concept of negative freedom of religion accepted by the ECHR constituted the foundation for proving the thesis posed in the fourth step of the argumentation, claiming that emotional distress resulting from the presence of religious symbols is unacceptable because of the negative freedom of religion, the violation of which is caused by such a presence.

According to the term introduced when defining the principles, on which the ECHR intended to construct its judgment, the negative freedom is a freedom not to adhere to any religion.<sup>59</sup> Using the formulated principles, the ECHR clarified the term of "negative freedom of religion" and significantly expanded its content to: "Negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism."<sup>60</sup> The ECHR further added: "that negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract

themselves if not by making disproportionate efforts and acts of sacrifice."<sup>61</sup>

The ECHR unequivocally determined that in the case of conflict so defined negative freedom of religion had precedence over positive freedom, which includes the manifestation of religious beliefs by the display of symbols: "the display of one or more religious symbols cannot be justified (...) by the wishes of other parents who want to see a religious form of education in conformity with their convictions."<sup>62</sup>

This view is far from obvious. By taking into account the content of Article 9 in the part that pertains to the public (alone or in community) manifestation of religious beliefs, the ECHR should have rather argued for the precedence of the positive freedom. But claiming that the display of religious symbols cannot be justified by the wishes of other parents, the ECHR also rejected the view of the equality of the negative and the positive freedom. In the case of equality it should have argued in favour of the mutual balancing of interests based on the tolerance and compromise among the views represented within a specific community, but it did not.

Based on the precept that "respect for parents' convictions with regard to education must take into account respect for the convictions of other parents," the ECHR concluded that "the State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought."<sup>63</sup>

The central part of so understood neutrality is not — as one might expect — the absence of arbitrariness in the diverse treatment of different subjects, but simply — in accord with the adopted characteristics of negative freedom of religion — an absence of religious elements in the state's activities.

With this in mind it is clear that in order to conduct the main argumentation it is not at all essential whether the presence of

<sup>59</sup> *Lautsi*, §47(3).

<sup>60</sup> *Lautsi*, § 55.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Lautsi*, § 56.

<sup>63</sup> *Ibid.*

the cross in classrooms was a result of a legal duty imposed on the school authorities, according to the ECHR — such display is unacceptable also in the case where a majority of parents of the children attending that school were in favour of a display of some kind of religious symbol.<sup>64</sup> Thus, according to the presented argument, the placement of a religious symbol would not have been acceptable even if parents of all children had expressed such a wish. The ECHR openly argued that the state not only was not to place religious symbols in schools, but in fact, the state had the duty to ensure that the school environment should be free of such symbols.

### 3. The state's dual obligation with regard to religious symbols at schools

The fifth step in the ECHR's argumentation contains a thesis that the state infringed upon its duty to deliver knowledge in an objective, critical and pluralistic way when performing its educational functions. This was done in two ways. First of all through the actions of the state itself consisting in placing or "authorising" the display of signs of a cross in schools. In this way the principle of secularism was violated and this violation could bring about emotional distress to those who in accordance with their philosophical convictions think that the state should not act in such a way. Second, the state did not undertake any action to ensure a pluralistic school environment that it did not act in order to remove from the school the sign of a cross

<sup>64</sup> It is not clear to what extent the placement of crosses in classrooms was the result of a simple implementation of legally binding norms. However, the final determination on this issue does not seem to be necessary in order to evaluate the basic argumentation. As the argumentation of the applicant indicated, the applicant did not challenge the legal norm pursuant to which school authorities placed crucifixes in classrooms, but rather she objected to the general presence of religious symbols in the state school classrooms, regardless of whether their placement were the result of direct observation of legal rules, or in response to the decisions made by a school board respecting the wishes of the parents. See *Lautsi*, § 56; *Lautsi GCh* § 40; compare P. Borecki, D. Pudzianowska, quote on page 11.

whose presence, according to the Court - violates the negative freedom of religion.

In the above argumentation the state has been treated not only as a subject which by managing schools may violate the freedom of religion, but also as a subject that is a guarantor of that freedom, and therefore is required to intervene everywhere, including in non-state schools, whenever this freedom is being threatened.

## VI. THE CRITIQUE OF THE CONCEPT OF NEGATIVE FREEDOM OF RELIGION ASSUMED BY THE ECHR

### 1. Difficulties with the justification

Anyone reading the judgment of 3 November 2009 may have some doubts about the status of the statements related to the negative freedom of religion, whether they should be treated as theses developed in the framework of the analysed judgment, or whether they were accepted as findings reached in the earlier ECHR's case-law. It turns out that none of these possibilities is correct.

One has the impression that the concept of negative freedom of religion is secondary to the principle of secularism. On what grounds did the ECHR recognise secularism, and in its "strong" version, as a position requiring a far-reaching protection in the European system?

The concept of negative freedom of religion recognised by the ECHR may be justified by the principle of secularism which comprises the obligation of impartiality and neutrality described in § 47 (e) of the judgement of 3 November 2009: "the State's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions."<sup>65</sup>

This is almost a verbatim quote from the judgment of 9 Octo-

<sup>65</sup> *Lautsi*, § 47 (e).

ber 2007 in the case of *Zengin vs. Turkey*.<sup>66</sup> One could think then that the ECHR had consulted the judgments of earlier rulings. However, this is not the case because the excerpt corresponding to the quoted equivalent was included in the part summarising the position of the applicant and not that of the ECHR.

Joseph Weiler vigorously disputed the thesis contained in the above-quoted excerpt. He represented before the Grand Chamber the states that had received the status of a third party supporting Italy. He emphasised the right of a community to build its identity. In exercising its right to self-determination a community may single out certain traditions and values. By such differentiation a state will unavoidably be in some sense "closer to some but not to other of its citizens." Since this rationale to favour certain traditions and values fails in the face of the right of self-determination, there would be a need for a separate justification as to why this singling out cannot happen through pointing to traditions and values of religious nature. Invoking the concept of negative freedom of religion defined by the ECHR would not have had, at this point, any argumentative value because the justification of this concept remains as yet undefined.

Neither has the broad concept of negative freedom of religion (which comprises freedom in the public space from any type of circumstances favoring any adherence to these or those religious or philosophical convictions) been supported by the case-law, despite a suggestion in the text of ECHR's judgment. The ECHR, while speaking about the negative freedom of religion and formulating the principles pertaining to the issue at hand,<sup>67</sup> referred to the judgment on the case of *Young, James and Webster vs. Great Britain*,<sup>68</sup> a case involving the freedom of joining trade unions, guaranteed by Article 11 of the *Convention*. The *Young* case concerned the pressures exerted on the workers to join

<sup>66</sup> *Zengin vs. Turkey*, app. 1448/04, judgment of 9 October 2007, § 39.

<sup>67</sup> *Lautsi*, § 47 (e).

<sup>68</sup> App. 7601/76; 7806/77, judgment of 13 August 1981, §§ 52-57. In the *Young* case "negative right" and in the *Lautsi* case "negative freedom" terms were used; this discrepancy did not make any argumentative difference in the judgment analysed here.

certain trade unions. In that case the ECHR concluded that it saw it unnecessary to establish whether Article 11 guaranteed the "negative right" not to be compelled to join an association or a union.<sup>69</sup> In this case, the ECHR argued including the hypothesis that even if Article 11 did not contain a negative aspect requiring protection on a par with the positive aspect, still a violation of Article 11 would occur if the compulsion were to reach a certain level. In the *Young* case that compulsion was the threat of losing one's job and means of livelihood, hence it was "a most serious form of compulsion."<sup>70</sup> And that level of compulsion was the fundamental reason for the ECHR to recognise a breach of Article 11. Moreover, as indicated in the ruling on the *Young* case, the preparatory works concerning Article 11 of the *Convention* clearly pointed out that the direct reference to the negative aspect of freedom of association had been deliberately excluded.<sup>71</sup> In later rulings, the ECHR recognised that Article 11 also referred to the negative element — the right to join and leave associations.<sup>72</sup> However, the ECHR considered it to be an open issue as to whether the negative aspect is equally valid as the positive one.<sup>73</sup> Thus it repeated the view that state actions limiting the negative aspect are not always violations of Article 11.<sup>74</sup> Therefore, the findings made in the *Young* case did not support the basic theses regarding the negative freedom of religion posed in the *Lautsi* case.

<sup>69</sup> *Lautsi*, §§ 51—52. The problem of referring to the case of *Young vs. Great Britain* in the *Lautsi* case has been addressed in the above-mentioned *Legal Memorandum* prepared by the ECLI.

<sup>70</sup> *Young*, § 55, see ECLI, *Legal Memorandum*, § II. B.

<sup>71</sup> *Young*, §§ 51—52. During the analysis of Article 11 of the *Convention*, the Article 20 of the *Universal Declaration of Human Rights* of 10 December 1948 was consulted, in which the negative element was deliberately excluded; *Sigurdur*, § 33.

<sup>72</sup> *Olafsson vs. Iceland*, app. 20161/06, judgment of 27 April 2010; *Sigurjonsson vs. Iceland*, app. 16130/90, judgment of 30 June 1993, § 35; *Gustafsson vs. Sweden*, app. 15573/89, judgment of 25 April 1996, § 45.

<sup>73</sup> *Sigurjonsson*, § 35; *Gustafsson*, § 45.

<sup>74</sup> *Gustafsson*, § 45.

## 2. Consequences of accepting the negative freedom of religion

### a. Consequences in the school environment

The following remarks are intended to point out some consequences of recognising a negative concept of religion in the approach taken by the ECHR. They also include the consequences of the principle of secularism that is a part of the negative freedom of religion with respect to the state's actions. These comments on the one hand are clarifying the analysed concept by revealing its consequences; and on the other, they play a polemical role by showing the consequences that are unacceptable they refute the assumptions drawn from.

One of the consequences would be elimination of all activities in schools which could be justifiably perceived by pupils as favouring one religion. Teaching religion in school is one such example. Pupils who do not want to attend such classes cannot be unaware of their existence; what is more, they learn about them from the communications directly delivered to them. Furthermore in countries where certain religions are named in constitutions, such information should not be delivered to pupils. Pursuant to the principle of secularism in the interpretation accepted by the ECHR, it is obviously contradictory to establish a state religion — as practiced by certain states-parties to the *Convention*.

It is also necessary to note that the postulate to include the State in the promotion of secularism is against the ban — also formulated by the applicant — on involving the state on the side of whichever type of religious or philosophical convictions (the ban on being "closer" to some citizens and not to others). This postulate is in no way compatible with the principle of the state's neutrality with respect to religious and philosophical convictions. The removal of the crucifixes from school classrooms would have been an action directly indicating that the state is in favour of one of the philosophical convictions and against others, also against those shared by a majority of parents.<sup>75</sup>

<sup>75</sup> Compare *Concurring Opinion of Judge Bonello*, 2.10, 3.6.

### b. Negative freedom of religion as a subjective right and the consequences in the public sphere

The conclusions drawn from the ECHR's argumentation in favour of the thesis that the placement of religious symbols constitutes a limitation on the religious freedom of parents and children, relate not merely to the actions of public authorities in state schools, or to the situations arising in either state or private schools, but pertain to the entire public sphere.

The ECHR has found that the negative freedom of religion precludes any practices and symbols that express — in a specific or general way — a belief, religion, or atheism. The mere presence of religious symbols limits the religious freedom of an individual. In the ECHR's opinion, in the cases where the actions of the state are involved, and the individuals on whom the presence of symbols is imposed cannot free themselves from their impact without disproportionate efforts, this freedom deserves particular protection. It can be concluded that such freedom deserves "normal" protection also in other cases. It is a subjective right which according to the limitation clause is the basis for limiting the rights and freedoms of other people, including also the freedom to manifest beliefs and religion (Article 9 § 2).

The negative freedom, in the ECHR's opinion, takes precedence over the positive freedom: "the display of one or more religious symbols cannot be justified (...) by the wishes of other parents who want to see a religious form of education in conformity with their convictions."<sup>76</sup> Any manifestation of religion in public space open to individuals following different faiths would be a limitation of the religious freedoms of non-believers or secularists. The implementation of the freedom of religion in horizontal relations among individuals or social groups would lead to behaviours devoid of any matters of religious nature.

The consequences derived here that stem from the concept of

<sup>76</sup> *Lautsi*, § 56.

negative freedom of religion adopted by the ECHR, that concern the elimination of any religious expressions in the public sphere and not just in schools are convergent with the postulates directly defined by the applicant. Nicolo Paoletti in his submission in the Grand Chamber described the secular position as one in which everyone "is free to exercise his religion within places of worship and not within public spaces such as state schools which are open to all citizens"<sup>77</sup>.

#### c. The contradiction with directly accepted elements of positive freedom of religion

If the above analysis is correct and the accepted solutions — especially the adopted concept of the negative freedom of religion — lead to the postulates of eliminating religious symbols from the public sphere, we would then face a destruction of the freedom to manifest, in public, religion or belief which is directly recognised in Article 9 § 1 of the *Convention*. If this were the case, then the fundamental concept of negative religious freedom being the foundation on which the above conclusion is set would be unacceptable. Likewise, correlated with that freedom the principle of secularism would not be acceptable as a standard of human rights protection.

Nevertheless, independently of the correctness of the argumentation based on Article 9 § 1, such a concept of religious freedom is inadmissible due to obvious contradictions with Article 2 of Protocol No. 1 which, among others, states that "in the exercise of any functions which it assumes in relation to education and to teaching and the state shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." The content of this provision indicates that in the process of exercising its functions in the areas of teaching and education it is not just the religious and philosophical convictions that are involved, but rather that in a normal situation

<sup>77</sup>The 13th minute of the recording from the hearing on 30 July 2010, <http://www.echr.coe>

it is a multitude of beliefs. Otherwise, it would make no sense to claim that parents were to define the manner or ways in which the teaching and education should correspond with those convictions; when in fact they are to be performed in compliance with the commonly and unanimously shared convictions, or directly following the principle of secularism.

#### d. The destruction of tolerance

The concept of negative religious freedom adopted by the ECHR leads — in horizontal interactions among community members — to the alleviation of the problem of religious tolerance in the public sphere, and also to the final resolution of it in the school environment as well. The implementation of the negative freedom of religion, in the meaning adopted by the ECHR, leads to the elimination of such situations where tolerance is required because tolerance can be required only towards something that is visible. What happens then is the removal from public life, and thus also from the school life, of one of the basic values of a democratic society. It is because tolerance is not only and not primarily important because it helps to prevent the escalation of conflicts, but because it allows individual members of the society to fulfil themselves as a unity — possibly in all their endeavors and aspects of their lives. From the social point of view, thanks to tolerance the society (by retaining its identity) is enriched by the multitude of traditions and cultures. The exposure to diversity allows people to deepen their own value systems. Tolerance reduces the tensions and social fears resulting from ignorance and not knowing who the other members of the society are.

The *European Convention on Human Rights* does not contain the category "tolerance." Nevertheless, tolerance is an essential value repeatedly recognised by the ECHR — which together with pluralism and openness — is inseparable from a democratic society.<sup>78</sup> The state

<sup>78</sup> See *Bączkowski et al. vs. Poland*, app. 1 543/06, judgment of 3 May 2007, § 63.

is regarded as the ultimate guarantor of pluralism,<sup>79</sup> and it also has the duty to take positive action facilitating the access to basic freedoms that admit into the public sphere the ideals reflecting personal beliefs, convictions, attitudes, etc.<sup>80</sup>

While searching for fundamental connotations in the perception of "tolerance" in the context of international protection of human rights, one cannot ignore that it is one of the goals of education indicated directly in Article 26 § 2 of the *Universal Declaration of Human Rights* of 10 December 1948. Its first goals were the full development of the human personality, thus encompassing also the religious aspect, as well as the strengthening of the respect for human rights and fundamental freedoms.

The implementation of the negative freedom of religion understood as proposed by the ECHR does not lead to "an open school environment," but to an environment closed to the values that are fundamental to personal development and are related to the sense of life and the environment which in the aspect of world view cannot be regarded as a pluralistic one. This stands in a clear contradiction to the ECHR's view that pluralism and tolerance are values inherent to a democratic society.

Furthermore, in light of Article 2 of Protocol No. 1, and within the context of school education, the state should be perceived as a subject obliged to support parents and children in introducing to the public sphere an expression of their convictions and beliefs. A differentiation of the appraisals of the state's actions depending on whom they are serving is justified; for instance, the judicial activity is different from the activities in the field of education which also are to satisfy the goals defined by the parents. Therefore, the argument in favour of the inadmissibility of the sign of a cross in the school environment, frequently raised by Nicolo Paoletti in the Grand Chamber based on the fact that the Italian Constitutional Court removed

<sup>79</sup>*Informationsverein Lentia and others against Austria*, app. 13914/88, judgment of 24 November 1993, § 38; *Bączkowski*, § 64.

<sup>80</sup>*Bączkowski*, §§ 62, 64.

crosses from its building upon recognition of the principle of secularism as a fundamental right of the Italian legal order, is not a strong one. The educational sphere is one where the state is obliged to take action in response to the parental beliefs. The sphere of state's actions turns out to be the "extension" of the actions of its citizens. The state's role is seen as that of a servant to its constituents, to its political community, who through the structure of the state fulfil different individual and collective needs and goals. It may be so that the state only organises the space in which the citizens themselves fulfil their goals. However, there are important social goals which in given circumstances the citizens cannot achieve acting independently, regardless of the positive actions of the state, and the educational goals usually belong in that category.

Neutrality and impartiality in a certain area, despite what the line of argumentation in the analysed case suggests, do not have to have a passive character or consist in refraining from taking an action, but they may have an active character in the sense that the state assumes in a certain sphere both neutrality and impartiality by way of including in its own actions different options chosen by the citizens.

## VII. JUDGMENT OF THE GRAND CHAMBER OF 18 MARCH 2011

### 1. Margin of appreciation

In its judgment of 18 March 2011, the Grand Chamber concluded that there was no violation either of the *Convention* or Protocol No. 1. The primary reason for this determination was the conclusion that in the discussed case the decision to place or not to place the sign of a cross in the classrooms of state schools belongs to the margin of appreciation of the Italian authorities.<sup>81</sup>

<sup>81</sup> See *Lautsi GCh*, § 76-77



According to the ECHR, one could present three fundamental reasons supporting the treatment of the controversial issue as falling within the margin of the state's appreciation. Firstly, the case concerns the continuation of traditions, related to the sphere of the cultural and historical development, which is highly diverse among European countries, and such issues, as a principle, belong to the margin of appreciation.<sup>82</sup> Secondly, there is the need to coordinate the functions of teaching and education of the state with the parents' rights to educate and teach their children according to their (parents') religious and philosophical convictions,<sup>83</sup> issues of this type cannot be decided in a unified way and require consideration of specific circumstances. Thirdly, there is a lack of consensus in Europe with respect to the placement of the crucifix in the classrooms of state schools.<sup>84</sup>

## 2. The issue of indoctrination

The occurrence of the identified reasons and the recognition that — fundamentally — the matter fell within the margin of appreciation did not absolve the ECHR from the duty to examine whether this margin had not been crossed, and whether there had been a violation of freedoms and rights protected by the *Convention* and by additional protocols.<sup>85</sup> The critical question that the Grand Chamber posed was whether the display of the crucifix in school classrooms was an indoctrination contradicting the provisions of Article 2 of Protocol No. 1, as disrespecting the parents' religious and philosophical convictions.<sup>86</sup> The ECHR undertook the examination of this issue, even though it had directly concluded that "There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that

<sup>82</sup> *Lautsi GCh*, § 68.

<sup>83</sup> *Lautsi GCh*, § 69.

<sup>84</sup> *Lautsi GCh*, § 70.

<sup>85</sup> *Lautsi GCh*, § 68.

<sup>86</sup> *Lautsi GCh*, §§ 62, 71.

it does or does not have an effect on young persons whose convictions are still in the process of being formed."<sup>87</sup> Hence this lack of evidence should, in principle, end the matter.

By examining the posed problem the Grand Chamber concluded similarly to what had been found by the Chamber, which issued its judgment on 3 November 2009, stating that the crucifix was primarily a religious symbol<sup>88</sup> and according to Article 2 of the Protocol No. 1, the duty to secure pluralism in education includes not only the care for the propriety of the content of teaching but also the care for the manner of delivering knowledge; so that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism.<sup>89</sup>

With respect to the *Folgero* case, the Grand Chamber concluded that different proportions in which different religions and beliefs are taught at schools depend on the proportions which reflect the composition of a given society and its shared opinions, and that it cannot be in itself considered as a disregard for the principles of pluralism and objectivity "amounting to indoctrination."<sup>90</sup>

The crucifix hung on the wall was recognised as a symbol "essentially passive", one that does not influence in a manner comparable to verbal proselytising (didactic speech) or to participation in religious practices.<sup>91</sup> The ECHR tied the issues related to the way in which the symbol affects people to the evaluation of the degree of neutrality in its passive sense. The Grand Chamber directly and clearly stated that it did not share the opinion contained in the judgment of 9 November 2009 that the crucifix through being an integral part of the school environment is a "powerful external symbol."<sup>92</sup> It is

<sup>87</sup> *Lautsi GCh*, § 66.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Lautsi GCh*, § 62.

<sup>90</sup> *Lautsi GCh*, § 71; *Folgero*, § 89.

<sup>91</sup> *Lautsi GCh*, § 72.

<sup>92</sup> *Lautsi GCh*, § 73.

noteworthy to observe that from the point of view of the complaint that it was against the secularist beliefs, this difference is irrelevant. What is relevant is that in the state's actions there is a correlation with some kind of religion, and that it is enough that the symbol is religious in nature and is on display. Whether the symbol by itself is of a passive or active type may be of material importance from the point of view of its impact on a person's beliefs related to a particular religion that it represents. In case of secularism it is the impact on a person's convictions as a result of the manner of the state's actions — state's behaviour. For example, it would be essential to determine how clear and obvious was for an individual — and in the challenged case for the children — that it were the actions of the state that were behind the displays of the crucifixes in schools. The ECHR had never considered that question, though.

The Grand Chamber also pointed out two issues that must be kept in mind when evaluating the "greater visibility" of Christianity in schools. First of all, the presence of crucifixes is not related to obligatory Christian teaching, and secondly, the school environment in Italy is open to different religions, and pupils may display their religious symbols, there are celebrations in schools marking the beginning and the end of Ramadan, or it is possible to organise classes in religions other than Christian.<sup>93</sup> Furthermore, the ECHR noted that the parents' right to have their children educated and advised according to their philosophical convictions had not been violated.<sup>94</sup>

### 3. Secular views as philosophical convictions

#### a. Status quaestionis

The recognition of secular views as beliefs or philosophical convictions, and therefore protected by the provisions of Article 9 of the

<sup>93</sup> *Lautsi GCh*, § 74.

<sup>94</sup> *Lautsi GCh*, § 75.

*Convention* and Article 2 of Protocol No. 1, is one of the key issues in this case. The conclusion that secular views are not of that kind, would have in principle closed the case in favour of Italy. The applicant, by requesting protection of the secular views pursuant to the above Articles, claimed that those views deserved greater protection than any other types of views (opinions) referred to in Article 10 of the *Convention*. The differences between the convictions (beliefs) protected by Article 9 and those protected by Article 10 are particularly explicit when one compares the limitation clauses indicating the conditions of the admissible restriction of the freedom to manifest one's beliefs and the freedom to express opinions.

The provisions of Article 10 § 2 specify the conditions for limiting the freedom to express opinions that encompass the freedom to hold opinions, and the freedom to receive and exchange information and ideas. And so, Article 10 § 2 provides that "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The limiting clause contained in § 2 of Article 9 does not provide directly for any relationship between obligation and responsibility, and enumerates fewer reasons justifying the limitation: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Hence the manifestation of beliefs protected by Article 9 is subject to greater protective measures, since those who enjoy this freedom are "allowed to do more," than only to express opinions referred to in Article 10.

In the 3 November 2009 ruling, the ECHR described the applicant's views as "sufficiently serious and consistent for the compulsory presence of the crucifix to be capable of being understood by her as being incompatible with them."<sup>95</sup> This definitely seems to be too little to recognise the secular views as being subject of the legal protection under Article 9 of the *Convention* and Article 2 of Protocol No. 1. In the *Folgero* case, referred to in the 3 November 2009 judgment, the philosophical convictions referred to in Article 2 of Protocol No. 1 were much better characterised as those that "attain a certain level of cogency, seriousness, cohesion and importance."<sup>96</sup> These issues recur in the judgment of the Grand Chamber.

The problem of recognising secularist views as those that are protected under Article 9 of the *Convention* and under Article 2 of Protocol No. 1 was the first issue tackled in addressing the essence of the case, and one that was resolved in the judgment of the Grand Chamber soon after redefining the problem.<sup>97</sup> The ECHR emphasised, in reference to the case of *Campbell and Cosans vs. the United Kingdom*,<sup>98</sup> that the supporters of secularism "are able to lay claim to views attaining the 'level of cogency, seriousness, cohesion and importance'<sup>99</sup> required for them to be considered 'convictions' within the meaning of Articles 9 of the *Convention* and 2 of Protocol No. 1.<sup>100</sup> The Grand Chamber — without undertaking any analysis in this area — concluded that the secularist views should be regarded as "philosophical convictions" as in the second sentence of Article 2 of Protocol No. 1, since these convictions are "worthy of respect in a

<sup>95</sup> *Lautsi*, § 53.

<sup>96</sup> See *Folgero*, § 84. See *Campbell and Cosans Against the United Kingdom*, app. 7511/76, 7743/76, judgment of 25 February 1982, § 36.

<sup>97</sup> While redefining the problem under discussion, the Grand Chamber has emphasised that the judgment does not require the determination as to the presence of crosses in places other than State schools, nor of the problem of acceptability as to the presence of crosses in State schools in relation to the principle of secularism which had been accepted by the Italian legal system; *Lautsi GCh*, § 57.

<sup>98</sup> *Campbell*, § 53.

<sup>99</sup> *Lautsi GCh*, § 58; *Campbell*, § 36.

<sup>100</sup> *Lautsi GCh*, § 58.

'democratic society',"<sup>101</sup> and that those beliefs "are not incompatible with human dignity and do not conflict with the fundamental right of the child to education."<sup>102</sup>

The recognition of the secular views of the applicant as philosophical convictions protected by Article 2 of Protocol No. 1, however, appears doubtful for two reasons. Firstly, the conclusion that these views are worthy of respect in a democratic society simply because they are not incompatible with human dignity is dubious. Secondly, the ECHR did not take into account one of the criteria adopted in its earlier decisions as essential in accepting certain convictions to be philosophical ones according to the interpretation of Article 2 of Protocol No. 1 — the criterion of the importance of the subject matter of those convictions.

#### b. Secular beliefs vs. fundamental rights and freedoms

Even though the Grand Chamber had unequivocally recognised that secularism is a belief in the sense of Article 9 of the *Convention* and a conviction in the meaning of Article 2 of Protocol No. 1, the ECHR had not further clarified how secularism is understood. Nor was that clarification included in the judgment of 3 November 2009. The analysed judgments contained different explanations provided by the Italian Constitutional Court and by the applicant. The Italian Constitutional Court stated that the principle of secularism "implied not that the State should be indifferent to religions but that it should guarantee the protection of the freedom of religion in a context of confessional and cultural pluralism."<sup>103</sup> Secularism is then understood in the spirit of neutrality and active impartiality.

Having regard to the fact that the ECHR recognised without any

<sup>101</sup> *Lautsi GCh*, § 58; *Campbell*, § 36; see *Young*, § 63.

<sup>102</sup> *Lautsi GCh*, § 58; *Campbell*, § 36; see *Kjeldsen, Busk, Madsen and Pedersen vs. Denmark*, app. 5095/71; 5920/72, judgment of 7 December 1976, § 50.

<sup>103</sup> The judgment of the Italian Constitutional Court of 12 April 1989 (No. 203); *Lautsi GCh*, § 23; compare to *Lautsi*, § 24, where the principle of secularism is discussed in the ruling of the Italian Constitutional Court as a "supreme principle (...),

reservations that the supporters of secularism are able to lay claim to views which are convictions in the meaning of Article 9 of the *Convention* and Article 2 of Protocol No. 1<sup>104</sup> it should be rather assumed that establishing that those views are worthy of respect in a democratic state and not incompatible with human dignity, the ECHR understood secularism in the same manner as did the applicant. According to the applicant, "The principle of secularism required above all neutrality on the part of the State, which should keep out of the religious sphere and adopt the same attitude with regard to all religious currents. In other words, neutrality obliged the State to establish a neutral space within which everyone could freely live according to his own beliefs."<sup>105</sup> What is involved here is neutrality and passive impartiality. The characteristics of secularism presented in Nicolo Paoletti's submission, who represented the applicant, is worthy of a note here, secularism is an approach where "each is free to exercise his religion within places of worship and not within public spaces such as states schools which are open to all citizens."<sup>106</sup> The principle of secularism therefore extends to spaces other than school, and the state's responsibilities are not limited to abandoning a certain type of action, but cover also those actions that are intended to create a neutral space, thus clearing the public spaces accessible to all citizens of religious symbols displayed there in such a way that their visibility is unavoidable unless an unproportional effort to avoid them has been made. The recognition of secularism as it was understood by the applicant was a sufficient basis to the recognition of a more broadly interpreted negative freedom of religion understood in the same way as by the Chamber that issued its judgment on 3 November 2009. Among the number of consequences of this approach that have been discussed earlier in this paper, there are also postulates which are incompatible with the

defining the State as a pluralist entity. The various beliefs, cultures, and traditions must coexist in equality and freedom."

<sup>104</sup> *Lautsi GCh*, § 58.

<sup>105</sup> *Lautsi GCh*, § 43, underlined by the author.

<sup>106</sup> The 13th minute of the recording from the hearing on 30 July 2010, <http://www.echr.coe>

right to manifest one's religious beliefs in the public sphere, which is directly formulated in Article 9 § 1 of the *Convention*, as well as with the values of tolerance and pluralism referred to in earlier judicial decisions passed by the ECHR. Hence, it is not clear whether the statement that secular views are not incompatible with human dignity from which human rights derive, including the right to manifest religious beliefs in the public sphere, is more than doubtful. The recognition of secularism as a belief in the meaning of Article 9 of the *Convention* and a conviction in the meaning of Article 2 of Protocol No. 1 is not congruent with the Grand Chamber's judgment and with a number of arguments that had led to that conclusion. However, it constitutes a convenient point of reference for the proponents of a radically viewed negative freedom of religion, who — as indicated by the unanimous judgment of the Court — are also among the judges of the ECHR.

### c. Secular views in light of the criterion of importance

The Grand Chamber referred to the ruling on the *Campbell* case while searching for the criteria to recognise certain convictions as "philosophical convictions" according to the understanding of Article 2 of Protocol No. 1, and during the fine-tuning of the meaning of the statement "appropriate level of cogency, seriousness, coherence and importance."<sup>107</sup> Although it considered only two out of three fundamental criteria which were recognised: being worthy of respect in a democratic society, and not being incompatible with human dignity and with the child's right to education. It should be, however, recalled one more criterion developed in the *Campbell* case. By pointing out the multiple meaning of the term "philosophical," the ECHR observed that for the purpose of interpreting Article 2 of Protocol No. 1, one cannot regard as philosophical merely the views included in an elaborate system, because the term "philosophical convictions" would then have too narrow a meaning. On the other hand, one cannot regard as philosophical "the views on more or less trivial

<sup>107</sup> *Lautsi GCh*, § 58.

matters,"<sup>108</sup> because it would result in protecting "matters of insufficient weight or substance."<sup>109</sup> Hence one should demand "a sufficient weight or substance" from the philosophical convictions in the meaning of Article 2 of Protocol No. 1.

In clarifying the characteristics of the secular views adopted for the *Lautsi* case that permit to recognise these views as philosophical convictions, or as beliefs that are "attaining a sufficient level of cogency, seriousness, cohesion, and importance;" one should also emphasise their "certain level of (...) seriousness (...) and importance" together with a certain level of cogency and cohesion. On the *Campbell* case the ECHR further argued that the word "convictions" occurring in the term "philosophical convictions" is similar in its meaning to the term "beliefs" occurring in Article 9 next to the term "religion."<sup>110</sup>

In short, the essential criterion upon which certain "philosophical convictions" are understood and interpreted in the meaning of Article 2 of Protocol No. 1 is what they concern, and the weight of the matter involved. To recognise them as philosophical convictions it is not enough, then, that they are worthy of respect in a democratic society or that they are not incompatible with human dignity.

In search of *rationis iuris*, for the particular protection of the freedom of thought, conscience and religion it should be noted that the religious or anti-religious beliefs are concerned with the relationship of an individual to God and how God is construed, and, or so-called finite matters — the ultimate sense of life and death. It is that type of convictions that could be regarded as "religious" or "a-religious" in the proper meanings of those words.<sup>111</sup> This situation is similar to that involving the convictions of conscience that are relevant primarily to

<sup>108</sup> *Campbell*, § 36.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> See M. Piechowiak, "Wolność religijna — aspekty filozoficzno-prawne" (Religious Freedom — Philosophical and Legal Aspects), *Toruński Rocznik Praw Człowieka i Pokoju 3* (*The Toruń Annals of Human Rights and Peace*) (1994-1995), p. 7-21, especially p. 17-20.

the actions of an individual and are of such kind that they engage a whole human being and are related to a broadly understood sense of life. Moreover, the test of the level of cogency, seriousness, cohesion, and importance encompasses also theistic views — since not every views regarding God is a religious conviction that is subject to the protection under Article 9 of the *Convention* and Article 2 of Protocol No. 1.

Secularism contains views more diverse in type than the religious or a-religious ones in the above explained sense.<sup>112</sup> In the argumentation presented to the Grand Chamber, N. Paoletti representing the applicant stated that the connection between secular views and religious or a-religious ones is absolutely irrelevant. What needs to be emphasized, though, is that the secular views do not concern the activities of the individuals who have rights and freedoms, but rather the activities and how they are carried out by the state. Within this perspective, secularism turns out to be in itself an approach of political nature. Consequently it should be protected under Article 10 and not under Article 9 of the *Convention*. The recognition of secularism as having a position equivalent to religious or a-religious world views would equal recognition of the quasi-religious character of political-type opinions.

While searching for a case analogous to the *Lautsi* case, one should invoke the case of *Valsamis vs. Greece*.<sup>113</sup> However, its inclusion would have led to decisions contrary to those adopted by the Chamber of 7 judges in the *Lautsi* case. The *Valsamis* case involved the participation of a 12-year-old daughter of Jehova's Witnesses in a National Holiday parade, which was obligatory for pupils at the school attended by the applicants' daughter. The date adopted for that holiday (28 October) commemorated the beginning of the war between Greece and the Fascist Italy (28 October 1940). The pacifist beliefs were involved in that case, because according to the doctrine shared by the Jehovah's Witnesses they were directly and significantly connected to the religious beliefs that prohibit participation

<sup>112</sup> Compare to *Concurring Opinion of Judge Bonello*, § 22.

<sup>113</sup> App. 21787/93, ruling of 18 December 1996.

in all actions, even indirect ones, that involve war or use of force.<sup>114</sup> The applicant regarded the participation in the parade of the representatives of armed forces as a fundamental issue. The ECHR decided that "such commemorations of national events serve, in their way, both pacifist objectives and the public interest. The presence of military representatives at some of the parades which take place in Greece on the day in question does not in itself alter the nature of the parades."<sup>115</sup> And thus the ECHR concluded that there were no grounds for the admissibility of the complaint. In the case of Jehovah's Witnesses, the pacifist convictions are closely related to religious beliefs. In the *Lautsi* case no such correlation was examined. One should also emphasise that with respect to the Jehovah's Witnesses' pacifism it is the actions of the individuals enjoying religious freedom and the right not to undertake certain actions that is discussed, and not the actions of the state, as it is in the case of secularism.

It may also be noted that the right to secularism, in comparison with the right to religious freedom, would have been the "second tier" right. It would have been concerned not with the actions of the right-holders, but with the realisation of figuratively understood (separate from concrete subjects) alleged conditions of fulfilment in the religious sphere. A more detailed analysis would be required to determine from a theoretical point of view which "second tier" rights could be balanced, or set off, with respect to the rights focusing on the actions of individuals, holders of those rights.

In light of the above analyses, the ECHR should have challenged the whole argumentation of the applicant based on the premise that secularism is protected by Article 9 of the *Convention* and by Article 2 of Protocol No. 1.

<sup>114</sup> *Valsamis*, § 6.

<sup>115</sup> *Valsamis*, § 31.

## VIII. CLOSING COMMENTS

The negative freedom of religion may certainly be described as a freedom not to adhere to any religion. In the herein discussed judgment, the ECHR created a twofold definition of the negative freedom of religion. Firstly, it recognised that this freedom encompasses not just the absence in the environment of the subject of this freedom of worshipping or teaching religion, but also the absence of activities and symbols expressing in some concrete or general ways the belief, religion or atheism. Secondly it gave to so understood negative freedom priority over the fulfilment of the positive aspect expressed in the manifestation, or expression of religious convictions in the public sphere, similarly it was put before the negative aspect expressed in the manifestation of agnostic or atheistic convictions.

The analysis of the ECHR's argumentation has revealed a number of weaknesses, and among them some significant defects with respect to the use of the case-law, that had led to arriving at unauthorised suggestions as to whether or not some fundamental questions regarding the interpretation of the negative freedom of religion had already been resolved and adopted in the Strasbourg case-law. The concept of religious freedom that was adopted by the ECHR in the judgment of 3 November 2009 leads to the destruction of the right to public manifestation of religious beliefs and to the destruction of tolerance as a fundamental value in a democratic society.

The judgment of the Grand Chamber recognised the admissibility of religious symbols in the classrooms of state schools. The Grand Chamber accepted the admissibility of the State to maintain neutrality and impartiality in the active sense, and not based on the State's indifference regarding issues of religion, but rather based on the way of including some religious elements. At the same time, as it seems, the Court was inconsistent and did not take into account the criteria worked out in earlier rulings. It recognized the secular views of the applicant as beliefs protected under Article 9 of the *Convention* and convictions in the meaning of Article 2 of Protocol No. 1. The recognition of secularism, as it was understood by the applicant, would

have led to recognising the radical version of the negative freedom of religion; and in consequence would have led to the destruction of tolerance and pluralism with respect to the issues of religion. The fact that the ECHR did not take into account the criterion of importance as a necessary condition in recognising certain views as convictions or beliefs — protected under Article 9 of the *Convention* and Article 2 of Protocol No. 1 — suggests its lack of appreciation for the specificity of religious values or other values fundamental to the world views of the rights-holders.

In light of the analyses carried out in this paper, secular views are views of political nature, since they pertain to the ways in which the state is supposed to function, and not to the actions which contribute to the personal development of the rights-holders. Hence secular beliefs should be possibly protected by the provisions of Article 10 and not those of Article 9 of the *Convention* or Article 2 of Protocol No. 1. Furthermore, the postulate of the protection of those views under Article 10 has doubtful justification, because the propagation of secularism, as it was understood by the applicant in the *Lautsi* case, or in the linked to it conception of radically interpreted negative freedom of religion, turns out to be the propagation of intolerance, primarily with respect to the implementation of the right to express religious and philosophical convictions in the public space.

Summing up the *Lautsi* case, it is impossible not to reflect on how it was possible that seven judges had unanimously — without any reservation — issued a verdict, and such a unanimous decision is challenged by the Grand Chamber of the same Court with an overwhelming majority of votes. Certainly, this fact does not strengthen the authority of the European Court of Human Rights in Strasbourg, as does not the quality of the justifications, and especially the one given by the Chamber.

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# **LAW IN THE FACE OF RELIGIOUS PERSECUTION AND DISCRIMINATION**

**Edited by**

**Tomasz Sokołowski**

Wydawnictwo Poznańskie • Poznań 2011





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Redakcja i korekta: Jacek Serwański  
Projekt okładki: Jacek Dudek  
Redakcja techniczna: Trevo — Grażyna Martins

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ISBN 978-83-7177- 849-0

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