PASSIVE / AGGRESSIVE SYMBOLS IN THE PUBLIC SCHOOL: RELIGIOUS DISPLAYS IN THE COUNCIL OF EUROPE AND THE UNITED STATES, WITH A SPECIAL FOCUS ON ROMANIA

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I. Introduction

The Grand Chamber decision in Lautsi v. Italy dashed the hopes of several types of actors and observers who had praised the preceding ruling in Lautsi (the Chamber decision).¹ Secularists and humanist organizations were dismayed by the “wrong-headed” approach of a court “in disordered retreat in the face of political pressure”, to quote David Pollock of the European Humanist Federation.² Legal scholars were disappointed by a ruling which failed yet again to move beyond the all-too-convenient escape route of the margin of appreciation³ and to embrace a “veritably anti-majoritarian” stance,⁴ as the initial Lautsi decision arguably succeeded in doing. Last but not least, and perhaps most relevantly for the path taken by the European Court of Human Rights (ECtHR) in this decision, some minority religious groups lamented the Grand Chamber ruling as “an unfortunate ‘end to the story of an icon that for years caused much opposition’”,⁵ while expressing concerns with respect to the protections afforded to minority faiths.

Though the Grand Chamber’s decision may be disappointing in the ways claimed above and, perhaps, in other ways as well, we believe it is not quite the letdown suggested by various commentators. In fact, while the ruling may not

¹ All references below are to Lautsi and Others v. Italy, 18 March 2011, European Court of Human Rights, No. 30814/06 (referred to as the Grand Chamber decision); and Lautsi v. Italy, 3 November 2009, European Court of Human Rights, No. 30814/06 (referred to as the Chamber or the initial or original decision). Fragments from the decisions are cited in-text by para.
do enough to move away from the current failings of existing ECtHR case-law, it could set the premises for developments that would respond to the concerns of secularists, legal scholars, and minority faiths. In this article, we aim both to examine in some detail the Grand Chamber Lautsi decision and several of the critical issues it raises, and to spell out the promise which, in our view, it holds out for those who express fears that it would negatively affect religious and non-religious minorities. In Part I we extend a previous brief analysis of the decision by dwelling on the most important issues in the ruling, also using insights from Establishment Clause jurisprudence in the US. In Part II, we present a current submission before the European Court by a Romanian civics teacher and religious freedom activist which, we believe, would help the Court clarify some of the current confusion, round out the relevant segment of its jurisprudence, and allay some of the worries of minority groups. Part III is devoted to analyzing the dissimilarities between the Romanian case and the Lautsi decision.

II. A Critique of Lautsi

This section provides our perspective on the Grand Chamber’s decision. Since the majority opinion arguably contains some inconsistencies, ambiguities, and even a few apparent contradictions, and since the Court has also raised a number of issues which it has not explored in depth, the interpretation below constitutes an attempt to impose closure on a text that remains open to alternative readings.

A. Neutrality, Indoctrination, and the School Context

It is relevant to start by looking at the framework within which the Grand Chamber places the matter at hand, and which the Court sketches in the first paras. of its ‘assessment’ of the case. In noting that “it is not required in this case to examine the question of the presence of crucifixes in places other than State schools” (para. 57), the Court announces that it will refrain from examining the general issue of ‘neutrality and impartiality’ that is one of the key dimensions of its Article 9 jurisprudence. To much the same end, the Court also observes that “in the area of education and teaching Article 2 of Protocol No. 1 is in principle the lex specialis in relation to Article 9 of the

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