RESTRICTING THE PUBLIC DISPLAY OF RELIGIOUS SYMBOLS BY THE STATE ON THE GROUNDS OF HATE SPEECH?

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I. Introduction

On 18 March 2011, a split majority of the Grand Chamber\(^1\) of the European Court of Human Rights (ECtHR) reversed the unanimous decision of the Chamber\(^2\) that the mandatory display of the crucifix in public school classrooms had violated the right to education under Article 2 of Protocol 1 and the freedom of religion as guaranteed by Article 9 of the European Convention of Human Rights (ECHR). Both the Chamber and the Grand Chamber declined to address the discrimination claim under Article 14 of the ECHR.

This chapter explores the limits that may justifiably be imposed upon the manifestation of religious symbols in the public sphere by the State. As there are no stipulated requirements for the relationship between the Church and the State within the Council of Europe—and despite the general predominance of secularism within modern European States—there remains a significant degree of variation in Church-State relationships. This is especially the case with the interpretation and application of secular ideas which may be compatible with the ECHR.\(^3\) Furthermore, the acceptance of a range of Church-State relationships correlates with both the ‘substantive’ and the ‘structural’ aspects of the ECHR’s margin of appreciation doctrine accorded to Member States.\(^4\) Some of these different Church-State relationships may, however, have intolerable consequences for State neutrality in denominational affairs and conflict with individual rights protected under the ECHR. Part of the perception of conflict is due to the mistaken conflation between principles of secularism and State

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1 Lautsi and Others v. Italy, 18 March 2011, European Court of Human Rights, No. 30814/06 (hereafter the ‘Grand Chamber decision’).

2 Lautsi v. Italy, 3 November 2009, European Court of Human Rights, No. 30814/06 (hereafter the ‘Chamber decision’).


neutrality. Whereas secularism may itself constitute a world-view or belief system, it is susceptible to regulation and limitation on par with other religious systems. The tolerance-based principle of State neutrality, which should be understood as a position of equidistance and impartiality, is unconcerned with the particular perspectives that characterise belief systems and instead dictates the requisite level of State detachment from the arena of denominational matters. Seen in this way, it is clear that there is the potential for State-sanctioned secularism to violate the principle of State neutrality. Secularism is not synonymous with neutrality and a State that champions secularism may in fact be taking a stance in denominational matters.

Religious symbols are, by both their nature and function, discriminatory mechanisms that serve simultaneously to ostracise those who do not share the belief system and to reinforce solidarity within the group of believers. The Regional Administrative Court in the Lautsi saga, although ultimately rejecting the discriminatory effect of the crucifix, nevertheless recognised this potential:

The logical mechanism of exclusion of the unbeliever inherent in any religious conviction, even if those concerned are not aware of it, the sole exception being Christianity … In Christianity, even the faith of an omniscient god is secondary in relation to charity, meaning respect for one’s fellow human beings … The cross, as a symbol of Christianity, cannot therefore exclude anyone without denying itself; it even constitutes in a sense the universal sign of the acceptance of and respect for every human being as such, irrespective of any belief, religious or other, which he or she may hold.

The Regional Administrative Court’s claim that Christianity, and its symbol of the crucifix, is the sole exception to the forces of exclusion inherent within organised belief systems is questionable as a dogmatic assertion provided without sufficient grounding. Furthermore, not only is subsidiarity of the tenants of the Christian faith to universal values extremely contentious, but the message received by the perceiver need not necessarily correlate with the intended message of the sender.

Returning to the ostracising effect of religious symbols, the discriminatory role these symbols play may mark the point of departure towards greater hostility. As Susanna Mancini has suggested:

5 Italian Constitutional Court Judgement No. 508 of 20 November 2000. See paras. 24 and 25 of the Chamber Judgement.
7 Judgement No. 1110 of 17 March 2005, para. 13.4, as cited in Lautsi v. Italy, 19 March 2011, European Court of Human Rights, No. 30814/06, para. 15.