If there is one thing the Lautsi judgements (the Chamber and Grand Chamber judgement) have demonstrated clearly, it is the need for a new mode of adjudication for the European Court of Human Rights. What should the Court have done in a case so much disputed and in which so many countries took sides? Whereas the Chamber in first instance concluded the Convention requires a secular, neutral stance regarding religious symbols in public school classrooms, the Grand Chamber—confronted with unprecedented political pressure—left the matter up to the state in question in as far as the perpetuation of displaying crucifixes was deemed to fall within the margin of appreciation of the state. Two diametrically opposed decisions—small wonder the Lautsi case caused so many reactions, ranging from those who regarded Lautsi I as an outstanding example of a countermajoritarian decision by the Court, to critics who rejected the decision as an intolerable and illegitimate exercise of judicial discretion. The latter group was relieved and satisfied by the Grand Chamber judgment.1

In this chapter, I will comment on the Lautsi judgements as a prelude to the core problem the case reveals. In my view, the Lautsi case demonstrate (anew) that it is time for the Court to develop a new mode of adjudication—a form of review which makes it possible to act as a countermajoritarian institution and set a European standard, without infringing state sovereignty.

---

1 What the Lautsi case again made apparent is that the present way of the ECtHR’s dealing with politically sensitive issues touches more and more upon the Court’s legitimacy. According to some scholars, legitimacy is the single most important attribute of legal institutions. “Legitimacy provides courts authority; it allows them the latitude necessary to make decisions contrary to the perceived immediate interests of their constituents.” James L. Gibson and Gregory A. Caldeira, ‘The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice’, 39 American Journal of Political Science (1995), p. 460; as quoted by Joshua L. Jackson, ‘Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Court’, 39:2 Connecticut Law Review (2006), at p. 777.
In Part II the Chamber’s decision will be analyzed and the *tournure* of the Grand Chamber of the ECtHR in its reference to the margin of appreciation—a doctrine which (some commentators say) masks the real basis for its decision.\(^2\) In Part III the position of rights under the Convention is assessed. The question is raised whether the difference in levels of rights under the Convention does not at the same time presuppose a difference in review by the Court. Subsequently, part IV deals with the position of the ECtHR and the question whether the Court can truly be considered a countermajoritarian institution. Part V assesses the different modes of judicial review and proposes a new mode of adjudication. As will be demonstrated, it seems possible to present a solution regarding the display of crucifixes in public school classrooms which does justice to all parties.

II. The Two Judgments in *Lautsi*

A. The Decision by the Chamber

Few cases before the ECtHR have aroused so many different reactions as those of *Lautsi v. Italy*\(^3\) on the prescription to display crucifixes at public schools in Italy. Maybe even more than the judgment in *Hirst v. United Kingdom*\(^4\) on the

\(^2\) As MacDonald puts it: “If the Court gives as its reason for not interfering simply that the decision itself is within the margin of appreciation of national authorities, it is really providing no reason at all but is merely expressing its conclusion not to intervene, leaving observers to guess the real reasons which it failed to articulate.” Ronald St. John MacDonald, ‘The Margin of Appreciation’, in Ronald St. John MacDonald, Franz Matscher and Herbert Petzold (eds.), *The European System for the Protection of Human Rights* (The Hague: Martinus Nijhoff, 1993), p. 85.
