

Balancing Secularism with Religious Freedom: In *Lautsi v. Italy*, the European Court of Human Rights Evolved

Until recently, the principles of secularism, religious pluralism and state neutrality have been perceived in the jurisprudence of the European Court of Human Rights (ECtHR) as partially overlapping concepts. However, in *Lautsi and others v. Italy*, the Grand Chamber of the ECtHR has – in a landmark decision – qualified the interplay between these ideas. This essay will argue that *Lautsi v. Italy* signals a turning point in the previous ECtHR jurisprudence, which often associated secularism with the protection of pluralism and democracy.

There are two main consequences of the decision. Firstly, the ECtHR recognised that a state's neutrality cannot be deductively constructed as a logical manifestation of secularism. In this context secularism means ‘a secular view of a lay public sphere as the only solution to ensuring genuine equality between members of majority and minority churches, agnostics, atheists or non-theists and eliminating religious and anti-religious tensions’ (McGoldrick 2011:454). For instance, in *Sahin v. Turkey*, the Grand Chamber explicitly embraced the narrative of the Turkish Constitutional Court that allied secularism with a defence of pluralism.

Secondly, in *Lautsi v. Italy*, the ECtHR recognised the epistemic implications of pluralism. Pluralism as a legal concept demands the recognition of diversity and the acceptance of a dialogue that transforms a multitude of legal orders (and a plurality of perceptions of the good life represented by such a multitude), in procedures aimed at accommodating concurring individual rights. Concurring rights are granted to all (e.g. the right given to parents to choose the type of education for their children) but they might generate

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

competing claims over public resources. The multiplicity of calls for recognition of individual rights makes it inappropriate and impractical for a state to favour one group over the other, leading instead to an open-ended dialogue in which institutions are, by default, receptive of all demands. McGoldrick calls this pluralist approach to faith based demands: 'positively secular' (2011:455)

I argue that the recognition of pluralism and the democratic practices that qualify that pluralism should be a point of departure for the jurisprudence of the ECtHR in areas such as the display of religious symbols in classrooms. This approach serves as an alternative to the practice of balancing rights, which greatly restricts the breadth of religious freedom and *de jure* imposes a monist conception of rational thinking.

The essay will be divided into three sections. The first part will discuss how the antagonistic relationship between theism and secularism in Italy has shaped the issues of religious symbols in the schoolroom. I will argue that concurring views of the significance of symbols have historically been part of Italy's cultural heritage and that there are strong indications that such a democratic dialogue will continue without a definitive solution being reached.

In the second section, I will explain the benefits of accepting pluralism as a criterion for assessing the extent of religious freedom in signatory states. A short third section will suggest a procedure that democratically accommodates concurrent rights.

Introduction

The case of *Lautsi v. Italy* reinvigorated a debate over the role of religious symbols in public schools in a way that is unprecedented in the modern history of Europe. In 2002, Mrs Lautsi complained about the Italian school policy of hanging crucifixes in her children's school classes. She probably would not have expected that, by the time her complaint

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

against the school governors of a school in Abano Terme reached the Grand Chamber of the ECtHR, her legal team would have had to plead against Italy and another 21 signatory states. At the time of her initial complaint, Mrs Lautsi's children were in a middle school (normally attended by children from 11 to 13 years old). The school was located in the small town of Abano Terme, on the outskirts of Padua and in the middle of the Venetian region.

Following a secret ballot, the Council of School Governors (composed of an equal number of teachers and parents) refused Mrs Lautsi's request. The council's deliberation was, subsequently, challenged by Mrs Lautsi at the first-instance administrative tribunal in Venice (Tribunale Amministrativo del Veneto). Italy, as is the case in many other European states, has a system of special jurisdictions that deal respectively with civil, administrative and labour law litigation with different final appellate courts (Walker 2010). However, questions concerning constitutional compatibility may be raised to the Italian Constitutional Court at any stage of the judicial process. Mrs Lautsi's counsellors did indeed question the constitutional admissibility of the crucifixes in her children's school classes.

More specifically, Lautsi's legal team asked the Italian Constitutional Court, via the incidental procedure, whether the two articles of two Royal Decrees (RDs) from the 1920s (Art 118 RD 965 of 30th April 1924 and Art 119 of RD 1297 of 26th April 1928), that by default imposed the display of crucifixes in school classes, were compatible with the secular principles adopted by the 1948 Italian Constitution (Panara 2011, Ronchi 2011). It was unfortunate that such a request was dismissed by the Italian Constitutional Court because both decrees were considered as secondary legislation (2004). The Italian Constitutional Court could decide only on the constitutional compatibility of primary legislation and the two Royal Decrees were secondary legislation.

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

Following the refusal by the Constitutional Court to evaluate the legitimacy of the two RDs via the incidental procedure, Lautsi's case reached the final appeal jurisdiction in administrative law matters (Consiglio di Stato). In 2006, the Consiglio di Stato also rejected Mrs Lautsi's complaint but, in that instance, the court discussed the significance of the crucifix within the school room (2006). Ronchi provides a detailed analysis of the argumentation delivered by the Italian administrative courts (2011). For a statutory analysis of the constitutional case, see Panara (2011: 141). Having exhausted all internal remedies, Mrs Lautsi's team brought her application to the ECtHR.

In 2009, the first instance of the second section of the ECtHR court ruled in favour of Lautsi (Weiler 2010). One of the arguments provided by the court was that having a crucifix hung in a classroom could be perceived by pupils as an attempt to direct their learning towards a particular faith (2009: 55). However, in the review stage in the Grand Chamber, the ECtHR accepted the Italian submission.

In Lautsi, the Grand Chamber of the ECtHR agreed (by a large majority) that the Italian state did not breach Art 2 of the First Protocol European Convention on Human Rights (ECHR) by imposing a duty on schools to display a crucifix on the classroom wall. Art 2 (in the First Protocol) safeguards the right of parents to have their children educated in accordance with their philosophical and religious beliefs. The court explicitly said on page 26 of the official HCtHR typescript that Art 2 of the First Protocol has to be read in relation to the second comma of Art 9 ECHR (2011: 60), which gives a certain level of discretion to signatory states in setting the limits of freedom of thought, conscience and religion.

The ECtHR argued that whilst a signatory state cannot set educational policies that indoctrinate pupils, Italy had a 'margin of appreciation' in setting policies such as the one

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

that allows the hanging of religious symbols in school classes. The range of analyses that followed the Crucifix Case engaged the plurality of theoretical, legal and pragmatic aspects raised by the decision. The verdict also divided the already polarised debate. Zucca, for instance, who welcomed the first-instance decision (of the ECtHR that ruled in favour of Mrs Lautsi) was not persuaded by the reasoning provided by the Grand Chamber that favoured Italy (2011).

It is outside the remit of this essay to provide a comprehensive summary of the reactions that followed *Lautsi v. Italy*. My aim is, instead, to show the enrichment brought by the Lautsi decision to the debate over religious pluralism. In particular, I would argue that by recognising a member state's discretion in setting a policy that accommodates concurring rights, the ECtHR accepted the pragmatic limits of imposing secularism as the default neutral stance of a modern pluralistic society. Before I articulate my argument, a series of methodological and contextual analyses are necessary as a preliminary aid to the discussion.

First, in this essay I will use the term 'belief-based political claims' to describe both theist and secular reasons for supporting an argument for or against the display of religious symbols in public institutions. Even if, in a debate over the historical development of human rights doctrine, a distinction can be made between assertions based on religious and secular narratives, in modern pluralistic societies, both groups of demands have to be considered as representative of a distinctive democratic political stance. In particular, it is a diminution of the democratic dimension of the debate over religious symbols to assume that secularism is not a belief-based set of assumptions (which might not be able to be rationally verified). In other words, secularism is no more able than theism to establish that all of its assumptions are self-evident and therefore neutral (Clouser 2005, 9).

The logic of such an approach would automatically impose secularism as a default position for any political system (and for the ECtHR), instead of giving a polity the possibility of being able to retrieve the pragmatic accommodation of claims made by two different political stances. I will also use the term ‘belief-based symbols’ as inclusive of both the argument for the hanging of the crucifix and for the empty wall argument. Clouser explains, I think in very persuasive narrative the close relation between the epistemic structure of non-secular and secular beliefs (2005, 35 – 41)

Second, the Lautsi case discusses a signatory state’s prerogative to accommodate in practice the concurring rights given to parents in Art 2 of the ECHR to decide on the religious education of their children. The debate over religious symbols in public space is inclusive of two typologies of debates (Mancini 2009). The first debate concerns whether the signatory state has the prerogative to display belief-based symbols in classrooms. A second typology of debates engages the dilemma as to whether a signatory state can impose a policy that prevents pupils, teachers and students from wearing garments that display a religious affiliation.

As an example of the latter typology, in *Sahin v. Turkey*, a Turkish medical student wearing an Islamic headscarf was refused entry to one of her exams by the exam invigilators. In the case that followed, the ECtHR accepted the Turkish state submission that justified the ban of headscarves on the basis, among other arguments, of reasoned protection of public order (2005). In the same category as *Sahin*, we might include decisions over the wearing of the veil in French schools (1995) and cases over school uniforms in England and Wales. These cases are the end points of a multifaceted debate over the limits of the rights allocated to *individuals* by the ECHR (Art 9) to manifest religious beliefs by wearing a garment with religious significance in a public space.

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

However, the case of *Lautsi* fits squarely into the first group of debates (Mancini 2009). In *Lautsi*, the ECtHR was asked whether a state policy that accommodates concurring rights (that is, the right of parents to choose a type of education fitting their beliefs) was set in a way that imposes religious indoctrination. Both dilemmas (the one raised in *Sahin* and the one in *Lautsi*) might engage Art 9 of the ECHR and the obligation of the state to be neutral, but the answer relating to their accommodation can be distinguished from the state's stance in terms of neutrality. The first dilemma focuses on an assessment of whether a right granted to individuals by the ECHR has been infringed by a state policy; the second concerns whether a member state's procedure is adequate for individuals to accommodate their concurring stances based on the same right.

I. Aggressive secularism in Catholic Italy: Not as odd as you might think

Italy, along with many other European countries, is experiencing the effect of what McGoldrick calls aggressive secularism. There is a plethora of reasons for the expansion of secularisation. Some are well articulated in debates such as the one between Ratzinger and Habermas, which explores the philosophical genesis of the debate (2005). Other analyses focus, instead, on the specific issues generated by the expansion of secular visions generated in European societies (McGoldrick 2011).

Perhaps one of the persuasive explanations of the increasing polarisation of views relating to the role of theist and secular stances occurs in Bauman's analysis. Bauman argues, for instance, that one of the side effects of a globalised society is the anxiety of belonging to an identity group. The identity group gives shelter to the instability of a fast flowing society, but it demands, in exchange, a periodic re-assertion of commitment by its members. The display of belligerence against aliens, or even better, against a rival group, is one of the ways in which individuals reassert their commitment to the community (Bauman 1999).

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

However, the same level of animosity may also be found in the theist/secular debate and in the literature that seeks to explain it. In this section, I will argue that such a method of analysis is sterile and a manifestation of the antagonism it seeks to explain. In particular, I would like to argue that a richer understanding of Lautsi's case can be obtained by considering an acknowledgement of pluralism and of the democratic limits of the jurisdictional accommodation of concurring belief-based claims.

Bauman's globalised society is a leviathan of polarised communities, which struggle for the recognition of their creeds and/or to retrieve resources. Parliaments and final appellate jurisdictions in Europe try to cope with the whirlpool of claims to the best of their abilities, worried that they too might be perceived as aliens and be the object of criticism by the loosing faction (Benhabib 1996, Breda 2007). At first sight, Mrs Lautsi's claims also appear to be a manifestation of a belligerent member of a minority group of atheists seeking an unreasonable recognition in a deeply Catholic state. The description is misleading.

The media and the great majority of polarised commentaries engaging the ECtHR decision dwelled on that set of assumptions. For instance, articles quickly referred to the fact that Mrs Lautsi held a Finnish passport and lived in a strongly Catholic region (Lamb 2011: 754, McGoldrick 2011: 464, Panara 2011: 143). The first assertion is irrelevant. The prerogative to challenge administrative acts by school governors is given to all parents, including those who might be considered immigrants without resident permits, and thus reporting in legal commentaries the fact that Mrs Lautsi was Finnish (with double citizenship) appears, at the very least, odd. Indeed, this would appear to be 'normal' procedure to discredit the claims of the 'out' group and reaffirm the 'in' group. For an analysis of the effect of portraying aliens in Italy, see Calvanese (2011).

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

The second observation – the reference to Catholic Italy – is misleading. Here, a distinction has to be made between articles that give blatant misdirection to their readers, and analyses taken from erroneous assumptions.

Lamb, for instance, considers Italy to be the successor of the Holy Roman Empire. ‘It [the ECtHR] decided that the Italian Republic, home of the Vatican and heir to the Holy Empire, was violating the human rights of its citizens by displaying crucifixes in its state schools’ (at 752). The Italian Peninsula is where the Vatican (a sovereign, international recognised state) is located, yet that space is shared with the Republic of San Marino and the Italian Republic. Just as the United States of America is not the home of Canada, none of the three states located in the Italian Peninsula is the home of any of the others. Furthermore, the Holy Roman Empire, which is normally associated with the Central European Carolingian Empire, has never included Rome, the Vatican State or the Venetian region, in which the case of *Lautsi* originated.

The analysis in Lamb’s article might be described either as an unwitting display of a lack of research or as a quixotic attempt to inflate his argument for rhetorical effect. However, these types of narrative, which seek to isolate Mrs *Lautsi*’s claim as an unreasonable demand can be found in most of the literature. For instance, McGoldrick uses this wording to describe the case: ‘Mr *Lautsi* is an Italian national who lives in Abano Terme, in the strongly Catholic region of Veneto in Northern Italy’ (at 464).

Again, the assertion is unfounded. Venetians – I use the term Venetians to define the residents of Veneto – might be baptised Catholics in 86% of cases, but that is not translated into an acceptance of an overlapping role between the state and church (Istituto di studi politici economici e sociali 2010). Veneto has historically been a pluralist society with one of the largest communities of Jews and of Greek Orthodox Christians in Europe.

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

This point is delicate, so I need to be precise. Jews were discriminated against by the Venetian laws. In mediaeval Venice, Jews were confined in a heavily polluted area called the 'ghetto'. The term ghetto has since become synonymous with discriminated communities. However, the point under discussion here is that Veneto cannot be described as strongly Catholic in the sense given by McGoldrick.

Politically, in Albano Terme and in the Venetian Regions, there is a strong representation of leftist political parties (including the Italian Communist Party). In Abano, for instance, depending on the political cycle, the control of the city council alternated between left and conservative coalitions, which were supported by Catholic-inspired political parties such as the *Unione dei Democratici Cristiani*. However, in the past decade, the political presence of Catholic-inspired parties in Abano Terme and within the Venetian region has been consistently under 15% of the voters. Even if considering the politically active Catholics as all being in favour of crucifixes (that is, the entire 15%) in schoolrooms, it is a matter of speculation as to whether the remaining 71% would think about the issues concerned. It is certain that at least a quarter of all Catholics in the region voted consistently for a coalition that included leftist parties with strong anticlerical views (*Direzione Sistema Statistico Regionale*, 2011).

So much for McGoldrick's perception of a strongly Catholic Venetian region. However, this is a trivial point. The argument here concerns the attempt to polarise the discussion, masking the true role of the debate as a manifestation of pluralism (Maziea 2004). More specifically, I argue that the attempt to mislead people on the significance of the debate (by somehow trivialising it) overlooked the Italian state's serious attempt to find a pragmatic accommodation of the debate over belief-based symbols in classrooms.

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

It is reasonable to assume that the decision to ‘hang the crucifix’ in the classroom was not intended as an imposition by a religious majority. A historical analysis might act to clarify this point. The contentious seed that germinated in the Lautsi case was planted on the morning of Friday the 15th of September 1860. The King of Piedmont, Victor Emmanuel II, signed RD 4336, which, in Art 140, imposed the obligation for all the Kingdom’s elementary schools to have a crucifix hung to one of their classroom walls. The motivation for RD 4336 and the edict that followed (e.g. Art 118 RD 965 of 30 April 1924) has been interpreted by the ECtHR, and by the rich literature that followed the controversial decision, as an obvious affirmation of a more general role of the entanglement between Catholicism and Italian institutions.

The representations made by the legal team representing the Italian state did little to clarify the position of the Italian government. The arguments made in the first instance by the Italian legal team suggested a relationship between Italian national identity and the crucifix. What has been left out, was that the King who signed RD 4336 was at war with the Papal state and he was about to be excommunicated.

Let me dwell on the contextual aspects of this point with a narrated reconstruction based on historical events taken from Montanelli’s analysis (2011) that I hope will bring some light to the contextual reasons that motivated the three decrees. The narrative will explain that in the debate over religious symbols in classrooms, Italy recognised a democratic accommodation of concurring religious beliefs that has been the result of a dialogue (often acrimonious) between leftist anticlerical positions and Catholics. Lautsi is, with some margin of equivocation that is implicit in any sociological narrative, a continuation of that debate between the holder of concurring rights (e.g. parents and teachers), which cannot be expected to be curtailed by a court.

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

On the morning of the 15th of September, the King of Piedmont was in his office. Victor Emanuel II (the soon-to-be King of Italy) sat in front of his desk. His closest advisor, Camillo Benso, the Count of Cavour (the soon-to-be, first Italian First Minister) stood next to the King's desk. He thought: 'If the Kingdom has to be saved, a series of shift actions have to be taken. The most urgent of all these actions is to prevent Garibaldi's army from taking Rome and the Holy Seat.'

The report deposited on the King's table said that eight days before (on the 7th of September), Naples had surrendered. Garibaldi's men, an irregular militia of 25,000 men, had defeated the main army of the Kingdom of Naples (roughly 50,000 men). What was left of the Neapolitan troops was encircled and about to surrender. The intelligence memo came from Piedmont agents (planted in Garibaldi's army by the Count of Cavour). The report continued: '... Garibaldi's troops are training on newly captured rifled barrel cannons and prepare for an assault on fortified walls of (presumably) Rome'. Camillo, who read the report earlier, and Victor Emanuel II, knew that an attack on Rome would drag France – perhaps Austria – into a move in defence of the Pope. Foreign troops would descend on the Kingdom of Piedmont, ending its history and perhaps the life of its King.

Early that summer, Victor Emanuel II sponsored (with weapons and logistic support) Garibaldi's quixotic plan to foster a pro-Piedmont revolt in Sicily. The King did not expect that such a small group of individuals could put an end to his Kingdom, and possibly to his life. The Count of Cavour was far more cautious. He opposed the initiative wholeheartedly. He thought that Garibaldi was a maverick and that the plan was very risky with few rewards.

The sponsoring of a civil revolt in Sicily was in violation of a secret agreement between the Kingdom of Piedmont and Napoleon III (the King of France). The agreement granted, in

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

exchange for the Region of Milan given to Piedmont the year before, an area of French political influence in the Centre and South of Italy. Sponsoring an insurrection in the south was a blunt breach of the agreement. Even worse was that Garibaldi could be 'too successful'. His ransacked army could, for instance, conquer Sicily, try to move north to Naples and finally to Rome. All this could make the Kingdom of Piedmont the official enemy of the Catholic Church and France.

This last forecast turned out to be correct. Garibaldi was preparing to take Rome – the last item on his list of objectives. The Papal army was numerically 'a match' for Garibaldi's, but in practice, Garibaldi's forces were veterans who were about to meet a band of inexperienced volunteers. Both the King and the First Minister knew that the Papal armies could not stop Garibaldi, and so Piedmont's troops should be placed between Rome and Naples.

By the 15th of September, the preparations for an expeditionary force were already underway. The Papal state divided the Italian Peninsula in two parts. If Piedmont's armies wanted to stop Garibaldi and a French invasion, they would have to march across the Papal state. Thus, two weeks before that meeting, the King ordered two Piedmont armies to start marching to meet Garibaldi's militia. Officially, sending 'uninvited' armies across a sovereign state's borders was an act of war, yet the ambassadors to Paris and London were instructed to explain that the troops' main objective was to protect the Pope and his secular power over central Italy (and was not to engage in a military campaign against the Holy Father or the Catholic Church).

In practice, again, a series of memos from Piedmont's military intelligence scattered on the King's desk drew a different picture. Rome was preparing to engage Piedmont's armies in the field. Strengthened by a flow of volunteers from many Catholic countries, Pio IX was

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

planning to attempt to engage Piedmont's expeditionary forces. The Pope did not need to defeat Piedmont; his objective was to escalate the conflict into a religious war that would have drawn France to his side.

A paradoxical situation unfolded. If the Kingdom of Piedmont wanted to prevent Garibaldi from entering Rome (and capturing the Holy Seat), Piedmont would have to go to war against the Papal armies. On Friday the 15th of September, neither Victor Emmanuel II nor the Count of Cavour knew that, but the following Tuesday (the 18th of September 1860), Piedmont's army would do exactly that. Piedmont 'disabled' the Papal army at the Battle of Casterfidardo. The victory would also bring an excommunication on Victor Emmanuel II. By the 1870s and the end of the Italian unification, with the Savoy troops taking Rome, all members of the Savoy Royal Family would be excommunicated (Montanelli 2011).

On that morning, Victor Emanuel II had had enough. He called one of his footmen and told him to prepare for his trip to Naples. He was about to leave the desk when Camillo Benso took a series of Parliament-stamped papers out of a folder. The two men's eyes met for the first time that morning. The King, famously short tempered, was about to explode. The Count perceived the hesitation and turned the pages of RD 4336 till his finger pointed at Art 140 and he said: 'Mon Roi, nous ne conduisons pas une guerre contre Dieu ... cette foi'.¹

The statutory provisions of RD 4336 were, by way of comparison to previous policies, idiosyncratic, and might have provided little relief to the Kingdom of Piedmont. In the decade that preceded RD 4336, the Piedmont Parliament sought to eliminate the system of

¹ [My Sire, we are not at war against God ... this time.]

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

mediaeval privileges granted to the Catholic Church. In particular, statute 978 of 29th of April 1855, also known as the Anticlerical Laws, promoted by Camillo Benso, disbanded all Catholic religious orders in Piedmont and commanded the expropriation of all their assets that were not beneficial to the state (e.g. schools and hospitals). In 1873, and despite the small concession of having crosses hung in the schoolrooms, the policy of the expropriation of Catholic orders was extended to all the territories of the newly formed Italian state – including Rome – and those who tried to oppose the measures were arrested. High prelates, including bishops, who preached against the King and his First Minister, were put in prison all over Italy (Montanelli 2011).

The reconstruction of the meeting is partly fictitious. However the historical events that surrounded it are, within the margin of error of any historical analysis, accurate (Montanelli 2011). The point that I would like to make is that the statutory measures (*ex* RD 4336) that set the seed for the Lautsi case were firstly, hastily drafted by an individual (Camillo Benso), with distinctive anticlerical views, and secondly, adopted by a worried King in a period of war.

In addition, and at pragmatic level, the decree made a very small concession to Italian Catholics. Firstly, the Kingdom of Piedmont could not afford to build new schools and would have had to depend on existing facilities. Two decades of war (including a costly expedition in the Crimea as an ally of France and Britain) sent the small state to the edge of bankruptcy. In most urban areas and *de facto* in all rural provinces, Sunday school classes ‘doubled up’ as elementary schools. It is highly unlikely that the local priests (or those newly graduated from Catholic institutions) would have taken the time, each Monday, to take down the crucifix from the school wall and put it back up on Friday. Secondly, the great majority of elementary schools in the territories annexed after the 1859 Franco–

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

Austrian War (e.g. Tuscany and the Milan Region) were managed by Jesuits and/or other religious orders. Thirdly, religious orders were also the governors of high schools and universities (spared by the 1855 Anticlerical Laws) that, at that time, trained the large bulk of the elementary and high school teachers. Given the admission process adopted by these educational institutions, it is logical to assume that most individuals were Catholics.

In short, RD 4336 gave to foreign powers (e.g. France) the impression of a tolerant Christian constitutional monarchy, but it *de facto* registered the existence of the crucifix on primary school walls (rather than imposing it). The historical situation surrounding RD 4336 also provides the necessary context to understand the Fascist decrees of the 1920s (RD 965 of 30th April 1924 and RD 1297 of 26th April 1928) directly reviewed in the Lautsi case. Fifty years after the unification of Italy, the pragmatic aspects that muddled the role of primary and Sunday schools were reduced. The anticlerical left, supported by Camillo Benso half a century before, had a significant impact on promoting a state-sponsored alphabetisation programme that included, among other things, a new school-building programme and the exclusion of religious teaching from the ministerial curriculum (Primary Education Guidance in RD 5724, 25th of September 1888). A policy of separation between state and church was also extended to the enforcement of common morality. Civil marriage was introduced in 1855, and in 1889, the Italian Parliament decriminalised homosexuality.

Given the historical trajectory taken by the young Italian state, RD 965 of 30th April 1924 and the later decree RD 1297 of 26th April 1928 which extended the crucifix on the walls of middle and high schools, appear incongruous.

However, the insertion of RD 965 might be explained by the attempt of a newly installed Fascist Party as a governing party in the Italian Parliament to reduce the political strength

of its opposition by forging an alliance with Catholic-inspired parties (Montanelli and Cervi 1981). The opposition of the 'soon-to-be' dictatorship included the anticlerical left, which, in the early years of the Kingdom, promoted an open anticlericalism. In 1924, the perceived necessity of a larger political support for the Fascist regime among Catholics motivated Benito Mussolini and Giovanni Gentile (the Minister of Education) to have the King sign a decree that extended the practice of hanging the crucifix in middle and high schools.

It is significant that until 1924, Mussolini had been an active exponent of the anticlerical movement (by writing, for instance, several pamphlets and editorials for the official socialist newspaper) and had worked, albeit quite briefly, as a primary school teacher. It is reasonable to speculate that both Mussolini and Gentile might have been witnessing some of the effects of the new secular school policies in forming the anticlerical teachers. Gentile noted, for instance, that taking the crucifix down from school walls had become common practice (Panara 2011: 140). Again, the reason for the change of heart by Mussolini is a matter of speculation, but there is enough historical evidence to suggest that he was willing to reduce the process of state-sponsored aggressive secular indoctrination in exchange for support for his antidemocratic policies.

To support the speculation that Mussolini's 'change of heart' was motivated by pragmatism, there is an articulated literature and also the fact that the U-turn was hidden from the view of the Italian Parliament (Montanelli and Cervi 1981). Indeed, Art 118 of the 1924 RD 965 (as well as Art 119 of RD 1297 of 26th April 1928), which imposed the display of the crucifix in middle and high school classes, was an administrative order (without parliamentary scrutiny) aimed at 'reiterating' the statutory measures of the RD 4336 (1860).

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

After the collapse of the Fascist regime, the debate over the hanging of the crucifix continued in Italian institutions. For instance, in 1950, religious symbols were excluded from the places that were used for elections. It is noteworthy that ballot boxes were often located in schools, and that that created situations in which crucifixes were taken down and not rehung. There are also indications that the measure was not complied with by those to whom it was directed. For instance, it would appear to be impractical to expect that a hospital managed by a Catholic order would take the crucifixes down from its walls if its bedbound patients expressed their intention to vote. For a narrated insight into the election practices in Italy within a hospital managed by a religious order, please read Calvino's *Watcher* (1975).

The example of a Jesuit hospital might be extreme, but the contentions I make here are that firstly, in Italy, there is a robust debate over the role of the theist and secular, and secondly, that the Italian deliberative institution (the Parliament) has consistently perceived the debate as unsettled. The state-wide lack of a settlement over the issue does not (and did not) prevent a local accommodation of the debate that expressed teachers and parents views.

II. Crucifixes: Symbols of divided societies or a manifestation of pluralism?

In the previous section, I explained how Italy is a pluralistic democracy with strong belief-based communities, which represent secular and religious groups. The existence of such pluralism is axiomatic and is historically inherited and recognised by the Catholic Church (*Hasson* 2003). In this section, I would like to argue that an open and on-going dialogue between theism and secular is beneficial for developing a richer understanding of the role of symbols in public spaces. In particular, I would argue that a policy of light intervention

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

by the state and by international jurisdictions might foster a democratic debate that dynamically adapts to set the scene for the increased demands of recognition.

At the theoretical level, a polity could generate a sense of solidarity and alliance among its members by discussing their aspirations without any reference to identity, history or faith. Habermas's theory of Constitution Patriotism is one of the latest attempts to set the basis for a post-national state and possibly a post-secular polity (1996). However, human rights principles are implemented by a process of dialectical refinement within a distinctive constituency. In the debate over state-recognised symbols in classrooms, there is reasonable evidence that such a process is on-going within Italian councils through their school governors and, more generally, in the whole Italian political arena.

Recall, for instance, that with the post-1948 Constitution, which recognised the secular nature of the Italian state, parliaments had several opportunities to engage with the issue, but left it unchanged. The idea of administratively allowing the crucifix in the classroom might be perceived as a sign of institutional bias, even perhaps state indoctrination, but this fear is unproved.

Crucifixes in Italian classrooms are part of an on-going debate, not an attempt to impose beliefs on others. All parents (Italian or not) can question the role of religious symbols (or the lack of them) in schools and it is the persistence of those symbols in some schools that is the most obvious evidence of the tension that a plurality of a system of beliefs generates in a diversified society. It is important in all democratic dialogues over concurring rights that a decision might have an impact (but, perhaps, it is more important in Italy, which historically has passed through the experience of the struggle for the recognition of a system of beliefs and has learned the hard way that such struggles do not admit a definitive solution).

However, developing a general criterion appears to be what is expected from the ECtHR, even in cases in which it might be unreasonable and undemocratic to assume that this would bring about a beneficial result. For instance, Ronchi points out the limited logical appeal of the idea of consensus as a criterion for a judicial decision (2011: 295). The rejection of the consensus as one of the supporting reasons is also found in Zucca:

‘The Court goes on to say that the philosophical convictions of the parents must be respected by the State ... Nevertheless, the Court manages to take away with one hand what it gives with the other in the very same paragraph, and in a feast of poor logic holds that this respect ... depends on the context and European consensus’ (2011).

Indeed, the reference to consensus could be further articulated. However, the frustration with the legal reasoning given by the court is a manifestation (based on a combined reading of Art 2 of the First Protocol and Art 9) of the court acknowledging the limits of its jurisdiction.

In particular, the case shows that Mrs Lautsi’s demand to the Council of School Governors is part of a struggle for the recognition of her beliefs in a democratic legal system: a legal system that recognises cultural diversity and that provides a variety of systems of accommodation for that diversity. This accommodation is not imposed, but is part of the democratic debate that has historically also been part of the theist–secular dialogue.

It is axiomatic that such a contemporary dialogue must start from some legal basis (two RDs signed during the dark moments of the history of Italy). It is also unfortunate for Mrs Lautsi that her request did not convince the Council of School Governors of Abano

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

Terme; however, the refusal to have Mrs Lautsi's children taught in a school without crucifixes is part of a larger on-going democratic process.

Developing this point, in *Lautsi v. Italy*, the existence of a consensus is relevant because the interlocutors (e.g. the school governors, the Ministry of Education, the Association of Atheists) seek to form an intercultural understanding, which does not presuppose (or impose) a comprehensive solution.

It is noteworthy that *Lautsi v. Italy* might not prevent the ECtHR from going back to the issue of crucifixes in school classes. For instance, if there were suspicions that state religious symbols were aprioristically imposed, it would be reasonable for the court to say that the issue set by concurring rights (*ex Art 2*) had not been democratically settled.

However, in *Lautsi*, the court recognised that the debate over religious symbols in classrooms was part of a well-established dialogue between political stances. It is crucial that signatory states recognise parental desires (*ex Art 2*) and that the court might demand that state institutions to acknowledge the parental claims and respond to them. However, it cannot be expected to impose what is the specific accommodation of those demands.

The ECtHR has the task of upholding the freedom of expressing religious beliefs, which the ECHR lists as one of the fundamental rights of modern democracy. However, the court cannot change the democratic process that accommodates concurring rights such as the right given to a parent to choose the type of education for their children (*ex Art 2* of the First Protocol). What the court could establish is whether each individual (and the political associations that represent him or her) has the democratic prerogative to initiate the process that might implement his/her rights and freedoms. In the absence of such a

process, the entitlement of a convention right such as the one given to parents to choose the type of education for their children would be hollow.

The democratic importance of the procedures that decide concurring rights has been downplayed by commentators who have restricted their accounts of the court recognition of the role of the consensus merely to a debate between a majority and a minority. This creates the false assumption that – in cases where there is an on-going debate over the qualification of concurring rights – a jurisdiction can provide definitive solutions. This expectation is illogical. For instance, the ECtHR might decide that signatory state policies have denied the enjoyment of the right to property (*ex* Art 1 of the First Protocol), yet we cannot expect the court to decide how the property market is regulated. Similarly, the democratic process that decides on the accommodation of belief-based claims in public schools should be considered outside of the court's jurisdiction.

Conclusion

Symbols are important. They are particularly significant in public educational establishments. The Grand Chamber of the ECtHR in *Lautsi v. Italy* decided that signatory states have a margin of discretion when deciding on which symbols can be displayed (or indeed not displayed) in Italian public schools.

In a relatively short motivation, the Grand Chamber acknowledged, perhaps for the first time, the conceptual separation between the task entrusted to the court (that is, the protection of the basic principles that allow for the functioning of a liberal democracy) and the practice of deliberating at the pragmatic level as to how concurring rights are accommodated.

The court decision might lack the argumentative support expected in a seminal decision.

The reference to a missing European consensus that justified the decision (combined with

an interpretation of Art 2 and Art 9) was perceived as an admission that human rights can be curtailed by the majoritarian principle. Such a position is unfounded. It stretches the reference to consensus to build arguments in which the court appears as a ‘puppet’ at the behest of public opinion and/or the Council of Europe.

A more reasonable interpretation of the case would consider the multiple ECtHR references to the concept of consensus as an acknowledgement of a European-wide ongoing debate over the role of belief-based symbols in public schools. In the case of *Lautsi*, the right allocated to parents to decide on their children’s education in relation to their system of beliefs is unchallenged by Italy’s submission. However, at the pragmatic level, the right of *Lautsi* to select the education for her children has to be accommodated with the concurring demands of other parents.

What is missing in the court’s decision is, perhaps, an articulation on how consensus should be formed. In the last section of the paper, I argue that a parent’s demand to change the display of belief-based symbols should be made at the school level. The debate should be open to all individuals and associations that might have an interest in the issue. The openness of the process will provide an indication as to how arguments are considered, and should reduce the effect of decisions based on pre-set alliances.

In conclusion, *Lautsi* created a turning point in the ECtHR jurisprudence relating to the display of belief-based symbols in classrooms. The decision might, in some areas, lack articulation. This is, however, a minor aspect of the case. In *Lautsi*, the Grand Chamber moved away from the deductive process that assimilates secularism with state neutrality and acknowledged the practical implications of accommodating conflicts in highly diversified European societies.

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

Bibliography

Bauman, Z. 1999. *In Search of Politics*. Oxford: Polity.

Benhabib, S. 1996. *Democracy and Difference: Contesting the Boundaries of the Political*. Princeton: Princeton University Press.

Breda, V. 2007. Constitutional identities in a liquid society , in *Liquid Society and its Law* edited by Priban J. Aldershot: Ashgate, 153-173.

Calvanese, E. 2011. *Media e Immigrazione tra Stereotipi e Pregiudizi*. Milano, Franco Angeli,

Calvino, I. 1975. *The Watcher & Other Stories*. New York: Harcourt Brace Jovanovich

Clouser, R. 2005. *The Myth of Religious Neutrality*. Notre Dame: University of Notre Dame Press.

Decision of 10th of July 1995. [1995] Conseil d'Etat Francais.

Direzione Sistema Statistico Regionale, 2011. *Rapporto Statistico 2011*, Venice: Direzione Sistema Statistico Regionale

Habermas, J. 1996. The European nation state. Its achievements and its limitations. On the past and future of sovereignty and citizenship , *Ratio Juris*, 9 (2), 125-37.

Habermas, J. and Ratzinger, J. 2005. *The Dialectics of Secularization*. San Francisco: Ignatius Press.

Hasson, Kevin (2003), Religious liberty and human dignity: a tale of two declarations , *Harvard of Law & Public Policy*, 27 (1), 81-92.

Dr Vito Breda

Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

Istituto di Studi Politici Economici e Sociali. 2010. *Rapporto Italia 2010*, Rome: Istituto di Studi Politici Economici e Sociali.

Lamb, R. 2011, When human rights have gone too far: religious tradition and equality in *Lautsi v. Italy*, *International Law*, 36 (3), 751.

Lautsi v Italy, [2009] 50 *E.H.R.R.* 1051.

Lautsi and Others v. Italy, [2011] 54 *E.H.R.R.* 60.

Mancini, S. 2009. The power of symbols and symbols as power : secularism and religion as guarantors of cultural convergence, *Cardozo Law Review*, 30 (6), 629-68.

Maziea, S. 2004. rethinking religious establishment and liberal democracy: lessons from Israel , *The Brandywine Review of Faith & International Affairs*, 2 (2), 3-12.

McGoldrick, D. 2011. Religion in the European public square and the European public life - crucifixes in the classroom , *Human Rights Law Review*, 11 (3), 451-501.

Montanelli, I. and Cervi, M. 1981, *Il Fascismo si Consolida (1925-1933)*. Milano: Biblioteca Universale Rizzoli.

Montanelli, I. 2011, *L' Italia del Risorgimento (1831-1861)* (Storia d'Italia, Milano: Biblioteca Universale Rizzoli.

Mouffe, C. 1999. Deliberative democracy or agonistic pluralism?" *Social Research* 66(3): 745-758.

Order 389. [2004] Corte Costituzionale.

Order 556. [2006] Consiglio di Stato.

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

Panara, C. 2011. Lautsi v Italy: the display of religious symbols by the state , *European Public Law*, 17 (1), 139 -68.

R. (On the Application of Begum) v Headteacher and Governors of Denbigh High School
H.R.L.R. 34,

Ronchi, P. 2011, Crucifixes, margin of appreciation and consensus: The Grand Chamber Ruling in Lautsi v Italy, *Ecclesiastical Law Journal*, 13, 287-97.

Royal Decrees 4336 of the 15th of September 1860, Turin.

Royal Decrees 965 of the 30th April 1924, Rome.

Royal Decrees 1297 of the 26th April 1928, Rome.

Sahin v Turkey. [2005] 44 E.H.R.R. 99

Walker, N. 2010. *The final appellate jurisdiction, The Scottish legal system*. Edinburgh: The Scottish Government, The Legal System Division.

Weiler, J. 2010. Lautsi: Crucifix in the Classroom Redux , *EJIL Talk* [Online], 12 (1)
Available at: <http://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/> [accessed: 25 July 2012]

Zucca, L. (2011), A Comment on Lautsi , *EJIL Analysis* [Online], Available at:
<http://www.ejiltalk.org/a-comment-on-lautsi/> [accessed: 25 July 2012]

Dr Vito Breda
Website: <https://www.law.cf.ac.uk/contactsandpeople/BredaV>

|