

# THE POSITION OF CHILDREN'S FREEDOM OF THOUGHT AND RELIGION IN THE RULINGS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE CASE LAUTSI v. ITALY

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**Abstract:** In the case *Lautsi v. Italy*, the European Court of Human Rights ruled twice on the validity of the presence of crucifixes in public school classrooms of a country where the principle of secularism rules. In the first judgement, the consideration of the children's religious freedom and, implicitly, their best interest helped the Court to justify the prohibition of the symbols, although it was not the main argument for it. However, the Great Chamber revoked this decision, considering the presence of these symbols in classrooms adequate under the European Convention by widely applying the doctrine of the margin of appreciation and, additionally, ignoring the legal position and the needs of the pupils, whose freedom of religion was reduced to a mere object of the parental guide capacities from a very questionable perspective.

**Keywords:** Freedom of Thought and Religion. Children's Best Interest. Children's Rights. Educational Neutrality. Secularism. Religious Symbols. European Court of Human Rights.

**Contents:** I.INTRODUCTION; II.THE CHILDREN'S BEST INTEREST AND THE FREEDOM OF THOUGHT AND RELIGION; III.THE PRESENCE OF THE CHILD'S FREEDOM OF THOUGHT AND RELIGION IN THE ARGUMENTS OF THE SECOND SECTION JUDGEMENT; IV.THE GREAT CHAMBER JUDGEMENT; V.CONCLUSIONS.

## I. INTRODUCTION

On 3<sup>rd</sup> November 2009, the Second Section of the European Court of Human Rights (ECtHR) gave judgement in response to the lawsuit submitted against the Italian Republic by Ms. Soile Lautsi. The appeal was based on a breach of her freedom of thought and religion of art.9 of the European Convention of Human Rights (ECHR) and her right to educate their children in conformity with their own religious and moral beliefs recognized in art.2 of Protocol No.1. The applicant considered that the presence of crucifixes in Italian public school classrooms, in which their children are enrolled, is an "interference incompatible" with these rights and, in particular, with the principle of secularism in which she wants to educate their children, blaming the State for allowing it with its current rules<sup>2</sup>.

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<sup>2</sup> *Lautsi v. Italy*, no. 30814/06, §3 and 7, ECHR 2009.

In her previous complaint before the Italian national jurisdiction, the Administrative Court of Veneto Region, by Judgment 1110/2005, of 17<sup>th</sup> March, refused to rule on the applicant's claim in relation to the violation of their rights to freedom of thought and religion raised in the terms of these articles of the ECHR. The national Court concluded the crucifix is the "symbol of the unique history, culture and national identity –as a characteristic immediately perceptible– and the expression of some of the secular principles of the community", so "legitimately can be placed in the public school classrooms, as not only not incompatible, but an affirmative and confirmatory addendum to the republican principle of the secular State"<sup>3</sup>. However, before adopting its final decision, the Court submitted to the Italian Constitutional Court a question of unconstitutionality against the applicable law in which, paradoxically, it argued that the crucifix is "essentially a Christian religious symbol of univocal confessional meaning"<sup>4</sup>. The Italian Constitutional Court finally dismissed the application for strictly formal reasons, without ruling on the merits<sup>5</sup>. Finally, the State Council, as the final appeal court in the Administrative Order, denied in 2003 the last Ms. Lautsi's request. Its judgement justified the presence of the crucifix as a symbol of civic values of the legal system that, in the cultural Italian context, is also a suitable representation of the values proposed by the principle of secularism<sup>6</sup>.

The Second Section of the ECtHR agreed unanimously with Ms. Lautsi's application, concluding that Italy had violated her right to educate her children in conformity with the own religions and philosophical convictions in connection with her freedom of thought and religion. However, the judgement was appealed to the Grand Chamber by the Italian Government in January 2010<sup>7</sup>, and it overturned the initial ruling. The Great Chamber determined that there was no violation of Art.2 of the Protocol No. 1 and there were no separate issues that could involve a possible violation of Art.9 ECHR. The main argument of the Grand Chamber to overturn the first instance judgment was (notwithstanding the subsequent more detailed analysis) that the concrete content of the rules on the presence of religious symbols in public schools was a question that falls within the discretion or "margin of appreciation" enjoyed by each State onward its main obligation to respect the right of parents to ensure the education of their children according to their religious and philosophical convictions<sup>8</sup>, because of the impossibility to find a common approach to all European countries.

The most obvious and general question underlying these rulings, especially the Great Chamber one owing to its arguments, is the existence of possible limits to the

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<sup>3</sup> Administrative Regional Court for the Véneto Region, Third Section, Judgement No. 1110/2005, §16.1.

<sup>4</sup> Italian Constitutional Court Ordinance No. 389/2004, 15<sup>th</sup> December, §10.

<sup>5</sup> From this judgment some questions about the operation of Italian constitutional system arise, particularly related to the scope and limits of the constitutional control of the law according to the art.134 of the Italian Constitution, a precept that is only applicable to those rules which have force of law. There are also issues about the real force and the position of the Italian Constitution as the higher rule in the legal system, since it is no possible to make a constitutional judgement about the content of pre-constitutional applicable rules because of the lack of an explicit derogating provision.

<sup>6</sup> Council of State, Section VI, Judgement 556/2006, 13<sup>th</sup> February, §3.

<sup>7</sup> *Lautsi v. Italy* [GC], no. 30814/06, §5, ECHR 2011.

<sup>8</sup> *Lautsi v. Italy* [GC], no. 30814/06, §76, ECHR 2011.

rules on the relation of States with the religious phenomenon as a result of the need to preserve the fundamental rights of citizens. The problems about the enjoyment of freedom of thought and, eminently, religion, have become a challenge for modern societies as a result of increasing pluralism, and is a good example of how difficult it is for States to conciliate the constitutional principle of secularism with the religion's increasing active role in the public sphere and, therefore, with its symbols (Parejo 2010). As a question eminently subjective, the arguments employed for defending or refusing the different approaches are usually impregnated with a powerful ideological charge very complicated to get away from.

The ECHR does not prejudge the different models of relationship between State and religion, but it imposes a duty of impartiality and neutrality that results in the inability to assess the legitimacy of different religious beliefs of its citizens<sup>9</sup>. This neutrality is an essential element for the public order and to ensure the necessary tolerance in democratic societies<sup>10</sup>, constituting, therefore, the starting premise for the free and correct exercise of individual religious freedom. Thus, this right comprises both the possibility to profess and express certain convictions as well as the option to not believe, always within the limits that a democratic society impose in order to protect public safety, public order, health or morals and the freedoms and rights of others.

If reading all the ECtHR doctrine (at least, before the *Lautsi* affair) it is possible to say that neutrality is desirable in those States that opt for the principle of secularism to govern its relations with the religion, but also in those who have institutionalized any form of enhanced relationship with one or several confessions<sup>11</sup>. In both situations, the public authorities must not take an active role in the promotion of certain religious values; they should only ensure a peaceful coexistence between different religious and philosophical options. The religious phenomenon should always be channeled into concrete rules in order to ensure a real pluralism and respect for the rights of all citizens.

However, that role of neutral guardian is not easy to play. It is not easy to determine when the public expression of a religion, particularly of religious symbols shared by the majority or not, violates the rights of other people. For this reason, the ECtHR has usually turned to the doctrine of the margin of appreciation when possible. However, the different judgements about religious symbols in public space share similar

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<sup>9</sup> *Leyla Şahin v. Turkey* [GC], no. 4474/98, §105, ECHR 2005-XI.

<sup>10</sup> *Id.* at §107.

<sup>11</sup> According to the Spanish doctrine (Llamazares 2002; Suárez 2005), neutrality is an attitude of abstention by the State with regard to private religious beliefs because it is, essentially, an individual question. But the principle of secularism is more than this. It also involves a clear separation between political power and religion and an attitude of cooperation with all faiths by the State in terms of equality intended to facilitate the individual exercise of the freedom of religion of all citizens.

This principle is also in force in Italy, For the Italian Constitutional Court; secularism emerges from the combined interpretation of various provisions of the Italian Constitution. According to Mancini (2010), this principle does not mean indifference towards religion but the equidistance and impartiality regarding different faiths, which the State is obliged to maintain in order to safeguard the freedom of religion in a context of religious and cultural pluralism, as well as a positive attitude towards all religions and religious communities.

conclusions, and the arguments and principles employed to base them have been only slightly different until the second *Lautsi* ruling, whose argumentative diversity shows an important rupture. The Court had always maintained a secular approach in their final decisions (Gibson 2009), which has not prevented it to be accused to employ this doctrine in favor of Christian values and against the Islamists ones because the final conclusion was always that neutrality should be imposed on these (Mancini 2010).

Apart from evaluative judgments on involved religious beliefs, if the judgement of the Grand Chamber is compared with the similar precedents, a clear change in the Court's priorities is visible. In previous pronouncements, including the first in *Lautsi*, the children's freedom of thought and religion has been, more or less, considered a right that can be breached by a religious expression in a public educational context<sup>12</sup>, but the Great Chamber only pays attention to the parents' rights and its relation with the margin of appreciation of the States. Without providing arguments, the negative freedom of religion of those who are directly exposed to the religious symbol is discarded as a valuable element of judgement.

This position is not compatible with the idea that children's rights are autonomous ones, different from the rights of the parents. The freedom of thought and religion of the children is closely related to the adults' freedom to choose the religious and moral education of them, but is a right with a specific object of protection: the formation of their conscience, an objective that should be achieved mainly through the education and considering the "children's best interest" as the essential and basic principle for it. The *Lautsi* affair was an opportunity to establish the protection guidelines for this right at the supranational level, so it is important to know whether the different arguments and conclusions of both rulings have any consequence on its configuration under the ECHR, but not as an isolated right but regarding the parents' formative rights and the principle of the children's best interest.

The doctrine who has studied the *Lautsi* judgements has not given more than a secondary treatment to the right of children. Authors are mainly focused in the debate about the implementation and the scope given to the margin of appreciation in the case of religious symbols in the public space, the value and the power of them or the meaning and consequences of the principle of secularism. There are hardly mentions of the presence of children's freedom of thought and religion as a component of Court's arguments<sup>13</sup>.

Given this situation, the main objective of this article is not to study in-depth all theoretical questions of the *Lautsi* judgements, but just to identify how the freedom of

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<sup>12</sup> Aside from some arguments of the Second Section judgement in the *Lautsi* affair, this point of view can be found in *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V, and *Dogru v. France*, no. 27058/05, 4<sup>th</sup> March 2009, where the Court expressly rejects to assess the complaint under the art.2 of the Protocol No.1.

<sup>13</sup> Among the consulted authors, only Barrero (2012, p.382-385) identifies the presence of the negative dimension of children's religious freedom as a part of the arguments employed by the ECtHR in the first *Lautsi* judgement, as a part of a wider analysis of the case law.

thought and religion of children is considered in each one. It is important also to check if the Court conclusions are useful to configure a set of rules for its international protection at the European regional level.

## II. THE CHILDREN'S BEST INTEREST AND THE FREEDOM OF THOUGHT AND RELIGION

The identification of children as subjects of fundamental rights has many problems due to their subjective particularities. Unlike adults, whose full legal capacity makes them the natural owners of the protective mechanisms guaranteed by the rights, children have traditionally been seen as vulnerable subjects needed of protection and guidance, humans in development process incapable of acting autonomously. This point of view changed after the Second World War, when the idea of the principle of human dignity as the foundation of the legal order above all individual considerations led to consider also children as subjects of fundamental rights, as a way to channel their personal development, on a basis of equality with adults (Asensio 2006).

Just because his developing personality, the child is "a creditor of a special protection mandate that justifies the need to protect the evolutionary process" in which he is immersed (Valero 2009: p.48). In response to this peculiarity, the legal status of the children's fundamental rights cannot be the same as the adults' one, suffering a restriction on their capacity to exercise them according to their maturity.

For this reason, these rights are regulated in specific legal instruments, based in their own substantive principles. At international level, and with general scope, children's rights are recognized in a specific international treaty, the UN Convention on the Rights of the Child of 1989<sup>14</sup>. This text comprises in an integrated and organized manner all the children's rights, resulting in a legal code distinguished by its specific target group. The only particular feature of the Convention is that its beneficiaries are a concrete group defined by its age, which covers, provisionally, all humans at a concrete stage of their life (Galinsoga 2002). For the Convention, underage people are individuals with the right to a physic, intellectual and social development and, therefore, they are holders of both the Convention's rights and those regulated in any other international treaty. Thus, the underage child is conceived as an active subject of rights, independent and direct holder thereof, not requiring any intermediaries for exercising them; it is assumed, as initial premise, that the rights and interests of children will not necessary be the same as those of their parents or guardians (Puente 2001).

At European regional level, there is no a specific text regulating all children's rights. The European Convention on the Exercise of Children's Rights of 1996 is focused in procedural rights, so it has a limited material scope. Additionally, there are other legal provisions dedicated to children, noteworthy of which are the arts.7 and 17 of the European Social Charter, that ensure the right of children and adolescents to a special protection against physical, social and moral dangers to which they are exposed

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<sup>14</sup> Resolution A/RES/44/25, adopted on 20 November 1989, by the General Assembly of the United Nations. In force since 2 September 1990.

(particularly against those consequence of their condition of workers) and the right to an adequate social, legal and financial protection respectively. The text also ensures their protection indirectly through other articles referred to the protection of maternity or family.

Along with the children's autonomy, the main principle and interpretative key of the Convention on the Rights of the Child, according to the UN Committee on the Rights of the Child, is their "best interest". In the sphere of the Council of Europe, this concept appears in the art.1.2 of the European Convention on the Exercise of Children's Rights as the main purpose of the text, and it is also mentioned tangentially in other instruments<sup>15</sup>. Despite this principle is not established with general scope at European level, it is reasonable to think the children's best interest is fully integrated in the ECHR a finalist guideline<sup>16</sup>, operating as a specific mechanism to ensure the dignity of a concrete collective. This conclusion is the result of a combined reading of the European Social Charter, the proclamation of the universal ownership of human rights made by the art.1 ECHR and the general prohibition of discrimination of the art.1 of Protocol No.12. The ECtHR itself did not hesitate to confirm or set some limits to the educational activities or curricular contents through measures clearly oriented to protect this best interest, as will be shown below.

The idea of the "best interest" suggests that underage people, because of their physical and intellectual immaturity, need a special protection even beyond their autonomy in order to become a citizen in the future. Despite its importance, this generic and formal standpoint shows a very complicated operability. It is a legal standard of dynamic nature, because it evolves according to the subject's circumstances, with a strong ethical dimension, circumstances that make its practical application not easy (Rivero 2000). The children's best interest is an undefined legal concept that cannot be delimited in the abstract, but should be materialized in each case by weighing the different interests involved and the specific current circumstances. Anyway, their best interest must always be the final object of the rules affecting children.

This is a very important principle for Civil Law, but this is not its only scope of application. It also constitutes an important teleological interpretative standard for fundamental rights, because it allows the evaluation of possible violations when there are children implicated. In this role, the idea of children's best interest coincides with the principles of human dignity and free development of the personality (Valero 2009), since it puts the child in the position of a subject of rights, refusing the notion that he is

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<sup>15</sup> The art.6 ECHR establishes the "interests of juveniles" as a limit for the trial publicity. The art.5 of Protocol No.7 allows the Governments to take "such measures as are necessary in the interests of the children" related to the circumstances of his parents' marriage.

<sup>16</sup> See "The principle of the best interests of the child – What it means and what it demands from adults", lecture pronounced by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, in Warsaw on May 2008. Accessible in: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/Speech\(2008\)10&Language=lanEnglish&Ver=original&Site=&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/Speech(2008)10&Language=lanEnglish&Ver=original&Site=&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

a simply object of them (Joyal 1991<sup>17</sup>). From this perspective, it is possible to establish an essential relationship between the children's best interest and their freedom of thought and religion, because this fundamental right is oriented, particularly, to protect the free configuration of the subjective moral and personal parameters.

Although the children's best interest and their freedom of thought and religion are inseparable and complementary, they are two different questions. Not all interference in the child's conscience will be contrary to his best interest. There will be incompatible to this principle only those which may disrupt his moral value system affecting his future autonomy, so the child would not develop freely. Likewise, every measure of ideological discrimination against a child must be considered, as well a violation of a fundamental right, as incompatible with his interest, because can constitute a coercive measure intended to make him assume certain ideas different from his own or his parents' ones.

The third element in the equation of the children's best interest is the right to education. First of all, as the primary mechanism to inculcate the concrete values that allow children to develop their individual personalities. Secondly, as the instrument the state recognizes to adults for rightfully influencing their children's convictions. This second dimension of education makes, in practice, the children's freedom of thought and religion to be controlled by their parents, existing the risk of identifying the children's best interest with the parents' one, which is not correct.

Looking at the rules, according to art.5 of the Convention on the Rights of the Child the parents have the duty of providing "appropriate direction and guidance in the exercise by the child of the rights recognized" according to his evolving capacities; this is a clause oriented to prevent abuse and impositions from parents, also applicable to the freedom of thought and religion. Then, when the art.14 of this Convention restricts the exercise of the child's freedom of conscience according to his capacities and under the parental direction is not allowing parents to make their sons and daughters to adopt their ideas, but to advise and protect them in their educational process according to their moral criteria. Even though there is no specific mention to the child's freedom of thought and religion in the Council of Europe texts, the Protocol No.2 of the ECHR (art.2) recognizes the right for parents to have their children educated in accordance with their religious and philosophical views. But, according to the above international rules, this cannot be conceived as an absolute right. The freedom of conscience is recognized for children under the general mention of art.9 ECHR and, if limited as a consequence of their lack of maturity, it should be respected and protected as a right to maintain certain convictions, to change them and to not to be compelled to do it, always under the parental guidance.

An excessive interpretation of parental rights, which puts adults' convictions over the education in freedom, involves the denial of child's autonomy and personality

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<sup>17</sup> Despite this assessment, the author is particularly critical with the vagueness and subjectivity the translation of this principle leads, and she considers whether it would be better for children to be normal subjects of the general fundamental rights system, without any applicative peculiarity.

and, above all, voids the content of his freedom of thought and religion, not respecting his best interest. It is true that, as a consequence of the situation of dependence in which is involved and the subjective content of his interest, child's rights cannot operate as an absolute limit for the parents or mentors. But, in line with the superior consideration of the children's best interest as a projection of their dignity, the purpose of the parental guidance is just helping children to achieve the future autonomy thanks to a comprehensive education oriented to their particular benefit. As an instrument of parents and public authorities to protect children against negative or not desirable impacts, the right of moral guidance should be exercised at the service of pupil's freedom of conscience. In other words, it has to look for their best interest.

For this purpose, the public authorities have a complementary role of the parents' primary obligation. The state, through the educative administration, is the guardian of the formation of future citizens in the most delicate stage of their life, when their conviction system is more vulnerable. In order to correctly implement the right to education, the state should create a neutral environment that allows every child to develop his specific interest without any other interference than the legitimated ones. In education, in its broadest sense, moral or evaluative elements will always be present, and sometimes it will be difficult to determine when they are appropriate to ensure the children's best interest. However, as a guideline, one can assume that the required values are only those which permit the child to improve his critical judgment according to his evolution, promoting present and future personal freedom. Every other moral content should be judged according to its incidence on the children's best interest through the two recognized rights. First, the right of the parents to have their children educated in accordance with their moral parameters, which will not be violated while the transmission of ideologically charged content is done in an objective, critical and pluralistic manner, avoiding any proselytizing intention (Valero 2009). And, above all, the freedom of thought and religion of children, which benefits if there is a plurality of objective educational contents and perspectives presented on equal terms.

### **III. THE PRESENCE OF THE CHILD'S FREEDOM OF THOUGHT AND RELIGION IN THE ARGUMENTS OF THE SECOND SECTION JUDGEMENT**

The first ECtHR judgement in the *Lautsi v. Italy* affair in November 2009 rules on an application submitted by Ms. Lautsi where, in her own behalf and on behalf of her children, she invokes the breach of two rights identified autonomously: her right as mother to educate her children in her own religious and moral beliefs (art.2 Protocol No.1) and her freedom of thought and religion (art.9 ECHR)<sup>18</sup>. According to the complainant arguments, no possible violation of children's freedoms arises before the Court, since the complaint only refers to Ms. Lautsi's own rights. The application suggests that the hypothetical infringement of children's freedom of thought and religion because of the presence of a religious symbol in their classrooms is a subsidiary issue of the mother's rights; however, the fundamental reason which sustains the

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<sup>18</sup> *Lautsi v. Italy*, no. 30814/06, §27, ECHR 2009.



violation of the involved rights is, paradoxically, the particular vulnerability of the children before external interferences due to their youth<sup>19</sup>.

Against the arguments of the applicant, the Italian Government focuses its arguments on the assumed non-religious connotations of the crucifix, presented as a neutral symbol whose presence in classrooms does not involve any kind of action or interaction from the students. According to Italian authorities, the crucifix is just a "passive symbol" with the same importance and entity than any other institutional or official icon because it represents secular values when regarded under the Italian constitutional tradition.

The first striking feature of this first judgement is the absence of any reference to the doctrine of the margin of appreciation, which had an important weight in previous rulings on States' competences on education and its limits, especially when there is a possible transmission of moral values<sup>20</sup>. This difference from the previous doctrine is the main argument of the most critical authors (Weiler 2010; Parejo 2010), who consider that ignoring this, the Court is imposing to the member States a particular type of relationship with the religious beliefs incompatible with the European constitutional diversity and the national particularities<sup>21</sup>. It is true that, until this judgement, the ECtHR had given a very wide margin of discretion to the States in matters related to religious freedom, but this doctrine, in practice, has not been very useful as protection mechanism (Solar 2011). One can question even if that margin of appreciation is not more than a formality designed to justify a completely arbitrary treatment on certain religious symbols (Ronchi 2011).

The principle the Second Section takes from the previous rulings and applies in this one is the prohibition of indoctrination as the limit for state decisions and policies in education<sup>22</sup>. The Court's previous doctrine clearly establishes the duty to refrain from imposing any religious value through the educative curricular contents. But this is not the only field of application for this principle. According to this judgement, the duty of neutrality imposes on the entire educative context as a whole, introducing expressly for the public educational environment some rules previously established on teachers<sup>23</sup>, and also on students<sup>24</sup>. In the Court's arguments underlies the idea of a public school as an inclusive space where all pupils and parents can be respected in their convictions beyond hypothetical impositions from ideological majorities. In words of Mancini,

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<sup>19</sup> *Id.* at §31.

<sup>20</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, no. 5095/71; 5920/72; 5926/72, 7 december 1976, §53, Series A no. 23; *Valsamis v. Greece*, no. 21787/93, §28, ECHR 1996-VI; *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V; *Folgerø and Others v. Norway* [GC], no. 15472/02, §84(g), ECHR 2007-III; *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, §51, ECHR 2007-XI.

<sup>21</sup> In the opposite direction, Mancini (2010, p.24) considers the judgement has indeed taken into account the Italian domestic context, because "the case analyses the history of the mandatory display of the crucifix in state schools, in the context of the relationship between the Italian State and the church, and cites all the relevant Constitutional Court case-law".

<sup>22</sup> *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, §52, ECHR 2007-XI.

<sup>23</sup> *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V.

<sup>24</sup> *Dogru v. France*, no. 27058/05, 4 march 2009.

(2010: p.25), this is an expression of the Court's "counter-majoritarian role (...) to correct some of the major deficiencies of majoritarian democracy", which is especially important in education, where religious minorities are, in fact, in a vulnerable position in regard to a majority that configures the system according its moral values and patterns.

The Second Section begins its ruling proclaiming the right of art.2 of Protocol No.1 should be considered in relation to the right to private life and the freedom of thought and religion, as well as its applicability both in the public and the private school. Thereafter, the Court exposes the essential substantive argument of its reasoning: the duty for the state to create an "open school environment" where indoctrination is prohibited and where the different religious and philosophical options can have a place in order to allow that the pupils "can acquire knowledge about their respective thoughts and traditions" as the best way to ensure, in the first instance, the respect to the parents' convictions<sup>25</sup>, or better said, those convictions the parents would transmit to their children within the framework of the educative pluralism that, according to the Court, is recognized in the art.2 of Protocol No.1<sup>26</sup>. But when the judgement develops that duty of respect to personal convictions, as a manifestation of the negative freedom of thought and religion, it does it in reference to both the conscience of the parents and the conscience of the pupils individually and separately mentioned<sup>27</sup>. With this detail, the Court is considering the children's convictions are also an object of protection and a final purpose of the state duty of neutrality.

So, the Second Section, at least in its approach and in part of the argumentative development, seems to take distance from the previous Court doctrine that established the art.2 of the Protocol No.1 is a special rule in relation to the generic freedom of thought and religion of art.9 ECHR and, under which, all controversies related to both articles should be solved only applying the first one<sup>28</sup>. Nonetheless, the judgement conclusions show this distance is only apparent, but gives interesting details.

This ruling has some explicit argumentative elements that are directly engaged with the art.9 ECHR, and show an approach to the matter that considers the freedom of thought and religion of the children as a relevant element, but less clear is if the Court really considers it as a separate right from parents' equivalent. In many occasions, the ruling shows how the children's freedom of conscience is confused with the parents' one and, even, is regarded completely dependent on the parental right of educative guidance. It seems that, for the Second Section, children's freedom of belief is not an autonomous right, but a simple projection of the parent's legal capacities.

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<sup>25</sup> *Lautsi v. Italy*, no. 30814/06, §47(c) and (d), ECHR 2009.

<sup>26</sup> *Folgerø and Others v. Norway* [GC], no. 15472/02, §84(b), ECHR 2007-III; *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, §47-55, ECHR 2007-XI; more explicit, *Appel-Irrgang and Others v. Germany* (dec.), no. 45216/07, ECHR 2009.

<sup>27</sup> *Lautsi v. Italy*, no. 30814/06, §47(e), ECHR 2009.

<sup>28</sup> Specially, *Folgerø and Others v. Norway* [GC], no. 15472/02, §84, ECHR 2007-III.

The freedom of thought and religion of the pupils appears in the ruling arguments when they refer to the particular vulnerability of their conscience. For example, the Court states as limit for the presence of the religious symbols its possible impact on the parental rights, but after it they have said that “the nature of the religious symbols and its impact on young pupils” should be considered<sup>29</sup>. It is also claimed that the religious symbols in the classrooms “may be emotionally disturbing *for pupils* of other religions or those who profess no religion” in a direct manner<sup>30</sup>, so it should be prohibited in order to protect the negative dimension of the freedom of thought and religion, directly attributed, apparently, to the pupils. Finally, the main conclusion of the judgement is that the presence of religious symbols in the neutral educational environment can influence in the formation of children's conscience, and that “restricts the right of parents to educate their children in conformity with their convictions” (art.2 of Protocol No.1), but also “the right of schoolchildren to believe or not believe”<sup>31</sup>. This last statement should logically conclude in a breach of the art.9 ECHR regarding the children in addition to the infringement of art.2 of Protocol No.1, but it does not.

Other premises also show a partial attention to the freedom of thought and religion of children as a different right at issue, and are those which reveal the presence of their best interest in the judgement. The first one is the importance given to the education in plurality, which is, after all, an instrument oriented to the correct development of the underage pupils' personality; inasmuch it is a basic component of the education in freedom, the plurality benefits the children's individual interest and supports the free formation of their ethics system against harmful interferences in a particularly vulnerable moment. In this way, the Court prevents against the risks that a possible religious preference manifested by the state can suppose on children, who do not have full critical capacity<sup>32</sup>. It is impossible to know if, saying this, the members of the Second Section of the ECtHR were thinking about the need to safeguard the free formation of the children's conscience as an expression of their best interest, but their reasoning clearly fits in this approach.

Less evident is the position given to the underage pupils in the global context of the matter when the specific behavior of the State is analyzed and the ECtHR concludes it is incompatible with the ECHR. At this point, the Court mixes and confuses the children's freedom with the parents' right to educate them. It is not possible to say that the legal position of the children and their best interest are clearly the core elements in the case because the limit imposed to the “indoctrination” in the public education is the duty to respect the parents' religious and philosophical beliefs. But it is obvious that these adults will not be exposed to the symbol as pupils will do; the measure of put a crucifix in a classroom will impact primarily on the children. If there is a transmission of religious values, it happens between the state and the pupils, and this circumstance is not desirable because may involve a decisive pressure on young minds without critical

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<sup>29</sup> *Lautsi v. Italy*, no. 30814/06, §48(d) and 50, ECHR 2009.

<sup>30</sup> *Id.* at §55.

<sup>31</sup> *Id.* at §57.

<sup>32</sup> *Id.* at, §48.

capacity enough. It is true that the pupils' beliefs have been previously oriented by the moral principles transmitted by their parents, but the impact on adults' rights is just indirect.

In these terms, the Court is recognizing that, with the presence of the crucifix, the children are being the passive subjects of an inadmissible proselytizing action by the state, regardless of the concrete right violated by this, because it is performed on vulnerable minds. However, due to the negative charge of the word, the Court does not employ the term "proselytism" in the ruling. It speaks about the interdiction of "activities of preaching" at school<sup>33</sup>, whose objective cannot be other than the proselytism. It also gives the idea of the enormous power as a transmitter of beliefs that a religious symbol placed in a classroom has in opinion of the Court.

In order to properly assess this question, it is necessary to deal with the debate about the "passive" or "active" force of religious symbols, which is one of the main argumentative lines of the Great Chamber ruling; thus, it will be analyzed in the following chapter. Even so, in this moment it should be noted that this first judgement on the *Lautsi* affair widely coincides with the decision, also from the Second Section of the Court, in the case *Dahlab v. Switzerland* of 2009, expressly cited as an argumentative referent<sup>34</sup>. In this decision, the Court ruled inadmissible the application of a teacher who was forced not to wear the Islamic headscarf in class by the Swiss education authorities. Even though there were no complaints from pupil's parents, the measure was considered rightful on account of "the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents, and by the breach of the principle of denominational neutrality in schools" because school teachers are "both participants in the exercise of educational authority and representatives of the State" and, so, responsible for "the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one's religion"<sup>35</sup>. As public figures inside the educational environment, neutrality is a compulsory duty for the teachers, not only a rule for the public spaces organization.

In the *Dahlab* decision, the doctrine of the margin of appreciation was not an impediment to assess the merits of the case. According to the Court, the headscarf, as a religious symbol, has a strong symbolic power, so, when displayed by a teacher, it could have a proselytizing effect on the pupils, with an impact which is hardly to measure because of the vulnerability of children due to their age. In these terms, the restriction of the teacher's freedom of religion is an adequate measure to protect State neutrality and the children's conscience because "appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils"<sup>36</sup>.

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<sup>33</sup> *Id.* at §47(c).

<sup>34</sup> *Id.* at §54.

<sup>35</sup> *Dahlab v. Switzerland* (dec.), no. 42393/98, §1.22, ECHR 2001-V.

<sup>36</sup> *Id.* at §1.24.

This reasoning also underlies in the Second Section judgement on the *Lautsi* affair. It is a very protectionist point of view to prevent any hypothetical undesired alteration in the pupil's conscience, and its consequence is that any religious symbol should be forbidden in the classrooms even if there is not a reported violation of the freedom of religion. In *Dahlab*, the Court gives a critical importance to the neutrality in the public educational system because of its instrumental role in the free development of children's conscience, and it legitimates any preventive limitative measure on fundamental rights. The final resolution of the *Lautsi* ruling seems to be obvious when considering this doctrine, even more because this case has two particularities which reinforce the sense of this line of argument. The first one is a difference in the concrete religious symbol exposed before the pupils. For a child, who do not really know what Islam is nor the meaning of its symbols, the headscarf can be interpreted as a simply garment without any religious value. However, the crucifix in a wall does not have any other possible sense than a religious symbol, as the Great Chamber itself recognizes in its further judgement<sup>37</sup>. If there are strong reasons to forbid in the public space a symbol that can easily have other interpretations than the religious one, at least for the pupils who will see it, there should be more to prohibit one whose sense is unambiguously religious.

The second difference between the case facts is the "place" where the symbol is exposed, and the different legal position of each one. In *Dahlab*, the restriction is imposed on a person, a subject of the freedom of religion; consequently, it constitutes a limitation on the exercise of a fundamental right. According to art.9.2 ECHR, this measure will only be lawful if it constitutes a necessary and proportional measure in a democratic society for the protection of pluralism, tolerance and the minorities<sup>38</sup>, in addition to meeting the criteria of the mentioned article, including the protection of the rights and freedoms of others. When the Court legitimates the prohibition of wearing a headscarf because it is "necessary", it is placing the objective of this measure beyond an individual fundamental right (in order to protect other rights), reinforcing its serious purpose. Unlike individuals, as Gibson (2010, p.212) says, "classrooms do not have human rights". On the contrary, a classroom is a material element property of the State where neutrality and impartiality should be represented in benefit of all. When displaying a religious symbol in a public building, there is not any relevant element which can override the pupil's (and parent's also) rights in a weighting of interests. There are no "fundamental rights of the state" in front of them. Thus, the prohibition of the religious symbol is even more justified than in the case of the teacher.

In any case, once it is concluded that the religious symbol placed in the public space has a real capacity of influence, an unquestionable proposition for Second Section of the ECHR, the question is to know on what element worthy of protection does it. The people directly exposed to the symbol are the pupils, as they are the attendants in the classroom where the crucifix is and who can be indoctrinated due to their immaturity and the educational context where the influence is received. But, is the measure of

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<sup>37</sup> *Lautsi v. Italy* [GC], no. 30814/06, §66, ECHR 2011.

<sup>38</sup> *Young, James and Webster v. The United Kingdom*, 31 august 1981, §63, Series A no. 44.

avoiding the religious symbol really oriented to protect their particular, individual and separate interests? If the pupils are old enough to have their own private beliefs and the state tries to convert them to another faith, there is clearly a direct violation of their freedom of thought and religion but, what happens when they are not mature enough?

It is true that, when the religious values introduced in the classroom do not correspond with the parents' ones, it is possible to see an infringement of art.2 of Protocol No.1, because the public authorities are educating children in ethics values that are different from parents' desires when they are not authorized to do that. The Court clearly agrees with this conclusion. But when the children are clearly immature and the values adopted by the public authorities are private ones which represent a concrete ethical point of view that does not correspond to the objectivity and plurality the education needs in order to train free citizens, there should be considered also a violation of their freedom of thought and religion, in addition to the parental right, as a consequence of a public policy contrary to their best interest.

For this reason, the art.9 ECHR should not only be as a complementary guideline of art.2 of Protocol No.1. It is also a directly applicable rule whose possible violation should also be explicitly taken into account as a possible limit to the indoctrination in public education, but the Court did not categorically establish this. Educative pluralism has a double objective: it serves the parents' right to ensure their children will share their beliefs, but it should be also considered as an instrument to develop the children's best interest itself. A pluralistic education, in a broad sense, allows pupils to know multiple options, different from the ethical values of their parents, in an objective manner, giving them a real option to choose with a high degree of freedom according to their evolution.

But the Court, at the end of the ruling, concludes that the presence of a crucifix in a classroom only violates the art.2 of Protocol No.1, along with the freedom of thought and religion in the abstract. So, is it possible to conclude this judgement directly protects the rights of the children as a way to ensure their best interest? Or the pupils' freedom of thought and religion is only taken into account as a projection of the parents' ones, which are exercised through the right to choose the religious and moral education of their children? The answer appears to be closer to the second option. In the previous rulings, particularly in the *Dahlab* case, the Court seems to have a special sensibility towards the specific interests of children that, in this judgement, finally dilutes in the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The idea of the children's best interest is implicit in the educative system's defining criteria employed by the Court; it takes into account some separate elements that define and reach that interest, but the concept itself does not appear in the ruling. For this reason, despite it is not ignored, the children's best interest has not the desirable entity in the arguments employed. In fact, the Court does not solve if the children are subjects of the freedom of thought and religion, and also fails to define the contents of this right when applied to pupils, or its relationship with the parental educational

capacities. It seems that, for the Second Section, the freedom of thought and religion of children is not an autonomous right, but not because of its relative dependence from parent's beliefs. When the convictions of children are referred, they seem to be identified as the same as the parents ones, without any consideration of their autonomous character, even though indoctrination is prohibited because of its effects on the conscience "of the pupils", not the parents.

This is a questionable perspective, because it concludes that children's convictions will be respectable and protected against proselytism only if they are the same than the parents' beliefs, which are the object of the only right considered as vulnerable, the art.2 of Protocol No.1. If pupils have a different faith than their parents it seems that a hypothetical public proselytism could be accepted inasmuch as those convictions have no fundamental protection. Forgetting the interest of the children and the obvious circumstance that they are different people from their parents, the Court shows a short perspective of the problem and, wrongly, focuses the benefits or the pluralist education only in the adults. In this sense, the judgment of the Second Section is very unambitious, losing a good opportunity to begin building a statute of the children as a subject of rights within the Council of Europe, and discarding arguments that would have been more difficult to refute for the Great Chamber.

#### **IV. THE GREAT CHAMBER JUDGEMENT**

##### **IV.1. Starting premises**

On March 2011, the Great Chamber of the ECtHR ruled again on the *Lautsi* affair because of the appeal of the Italian Government against the Second Section judgement. In the new procedure, decided by majority of 15 votes against 2, the Court revokes the initial ruling to conclude that the presence of a crucifix in the classrooms of Italian public schools does not violate the right of the parents to ensure the education of their children according to their own convictions in the terms of the art.2 of Protocol No.1. The Court also considers there are no questions that should be specifically analyzed under the art.9 ECHR, restricting the problem to the parental right as a special rule in relation to the freedom of thought and religion (of the adults)<sup>39</sup>. The Great Chamber even asserts there is no violation of the children's parental right of educative guidance<sup>40</sup>, as if the pupils could be the active subjects of this right. This can give the idea of how confused are the judges about the real dimension and meaning of the involved rights.

The consideration of art.2 of Protocol No.1 as *lex specialis* was yet present in the foundations of the initial ruling on this case, but now this principle is applied more strictly. In the arguments of the second *Lautsi* judgement, the hypothetical incidence of the religious symbol on the children's negative freedom of religion has no place. The conduct of the Italian State is always put in relation with the right to choose the moral

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<sup>39</sup> *Lautsi v. Italy* [GC], no. 30814/06, §59, ECHR 2011.

<sup>40</sup> *Id.* at §78.

and religion values of the education of the children, and only the possible breach of this right in the educational environment is assessed<sup>41</sup>. This is the first mistake of the ruling, consequence of an inadequate doctrine of the ECtHR. Only the position and the rights of the parents are conceived, so the child's freedom of thought and religion turns completely empty and his subjective capacity annulled.

Under this circumstance, it is very difficult to study the possible consequences of the arguments of the Court in the configuration of children's freedom of thought and religion, because this right is just simply not part of the *ratio decidendi* of the ruling. For the Court, the only right with entity enough to be considered is the parents' right to ensure such education and teaching of their children in conformity with their own religions and philosophical convictions, not even their freedom of conscience. The sum of the delimitation of legal positions and the argumentative development leads to a doctrine which converts the pupils in the weak object of the absolute right of their parents to define their convictions and, therefore, results incomplete.

Despite its omission, the particular freedom of thought and religion of the pupils and the need to safeguard their best interest, which is the main objective of the educative system, should be taken as assessment criteria of the Court's arguments. They are the elements that allow finding out whether the doctrine developed is useful to protect them, directly or indirectly through the right of educational guide.

Aside from this, the Great Chamber judgement repeats two premises of the previous one, although its concrete application to the case is surprisingly different. First, it declares that State has the duty to adopt a neutral and impartial position in relation to the exercise of religious pluralism, where the right to not believe in any religion is also included<sup>42</sup>. Consequently, the Court considers that indoctrination and proselytism through education is forbidden, but only when it "might be considered as not respecting parents' religious and philosophical convictions", no matter the possible consequences on children's best interest. The right of the parents, and only this one, is the limit to the, on the other hand, wide margin of appreciation the States enjoy to configure the educative sphere, which includes "all the functions" assumed in this field and not only the setting and planning of the curriculum<sup>43</sup>.

On a separate issue, the Great Chamber expressly recognizes the essentially religious nature of the crucifix beyond any other possible lecture of its meaning<sup>44</sup>. However, the reasons given in developing this principle are not well justified. The consideration of the crucifix as a religious symbol contrasts with the absence of indoctrination capacity that the Court attributes to it, turning over the reasons given by the Second Section without a real explanation. Then, the Great Chamber appeals to the lack of a European consensus in the regulation of the interaction between public sphere

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<sup>41</sup> *Id.* at §63. The references to art.2 of Protocol No.1 as the sole judgement parameter can be found in §63-66 and 71.

<sup>42</sup> *Id.* at §60.

<sup>43</sup> *Id.* at §62-63.

<sup>44</sup> *Id.* at §66.



and religion to justify an extension of the doctrine of the margin of appreciation beyond the limits previously imposed.

#### **IV.2. The appraisal about the intrinsic force of religious symbols**

For the Great Chamber, “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 it does or does not have an effect on young persons whose convictions are still in the process of being formed”<sup>45</sup>, so there is no breach of the right recognized in the art.2 of Protocol No.1. Even though pupils' convictions are shortly mentioned, their subordination to the parental guide right reinforces the idea, which underlies also in the first judgement, that the children's ideas and beliefs are only relevant when they are the same as the ideas of their parents, with no autonomous entity.

The Great Chamber justifies the crucifix has not any indoctrinatory effect on pupils because it is a “passive symbol”<sup>46</sup>, despite its obvious religious sense that clearly affects the state neutrality and impartiality<sup>47</sup>. This statement is particularly confusing because nobody explains what it means or where is the difference with an “active” symbol. In fact, the position of a symbol presiding a classroom and the educational activities converts it in an icon with a clear and significant presence, making it “active” (Llamazares Calzadilla 2005) no matter its concrete religious or secular character. However, the Court simply asserts the harmlessness of the crucifix for the conscience of underage pupils and, additionally, its inability to counteract the parents influence on them because there are no evidences that it can do it. But, heretofore, the presumption was completely the opposite: except proof to the contrary, the mere presence of a religious symbol in a classroom was an indoctrination act. This is exactly the reason the Court employs in *Dahlab* to justify that the prohibition of wearing a headscarf imposed to a teacher does not breach the ECHR (Arlettaz 2012).

The main doctrine has changed from considering every religious symbol has a proselytizing effect to think that one in specific has not without giving any reason. This constitutes an unjustified change of criteria before two equal cases.

It is very difficult to find a satisfactory explanation of this circumstance. The different age of children in each case does not seem relevant (Ronchi 2011), because in *Dahlab* the pupils were between the ages of 4 and 8, and in *Lautsi*, between 8 and 12, a very close interval and a very similar possibility to be influenced at school. Neither is logical to consider (Zucca 2013) that a symbol on a wall is not strong because is not being referred by teachers, nor that only worn symbols can indoctrinate, because it ignores the direct impact consubstantial to every visual representation. Precisely because of this effect, it is impossible to conclude that indoctrination can only be

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<sup>45</sup> *Id.* at §66.

<sup>46</sup> *Id.* at §71-72.

<sup>47</sup> As expressed by judges Rozakis and Vajić in their concurring opinion. However, they consider the negative impact on State neutrality does not constitute a transgression of the Convention itself.

materialized by the words, taking part in religious activities or through the non-objective confessional instruction, as expressly the Great Chamber says<sup>48</sup>.

Finally, giving a symbol a passive character because the values it represents are conceived as more respectable or are not unfriendly with the beliefs shared by the majority is, simply, a discriminatory argument incompatible with neutrality and pluralism. Nonetheless, the Court shows a tendency to overprotect the predominant religious confessions beyond neutrality (Solar 2011) and, until the first *Lautsi* ruling, “Christian values have been defended even at the expense of trampling on fundamental individual freedoms, because the ECtHR did not perceive them as conflicting with the core values of the Convention system” (Mancini 2010: p.23), so it cannot be ruled out this idea, as well as a possible purpose to correct the discordant Second Section judgement in the *Lautsi* affair.

The position adopted by the Great Chamber imposes “an incomparably weaker requirement to justify a limitation of the freedom of religion of the teacher than to justify the limitation of the state power”, which is not subject of rights (Solar 2011: p.583). In fact, under these arguments, the State has a greater capacity to express a religious adhesion than a citizen when, paradoxically, it has a duty of neutrality that must be strictly observed in order to guarantee the correct configuration of the educational environment and the respect of the related rights<sup>49</sup>. The resulting doctrine says that the exhibition of a religious symbol by a person who plays a public educational role must be forbidden due to its proselytizing effects; however, when is a public institution itself who shows the symbol in its facilities, those effects are not conceived as possible, perhaps because of the false idea that a subject can have the intention to indoctrinate others while the State (or, better said, the people who manage the State) cannot.

Likewise, the Court is establishing a modulation in the scope of art.9 ECHR according to the contents of the subjects’ convictions or beliefs. Thus, under the topic “religious symbols in the public educational environment”, it is possible to find the following legitimated solutions: when a personal religious demonstration of a public servitor in the public space can have an impact on different religious convictions of other people, the first should be limited in order to protect these last (conclusions in the case *Dahlab*). When a State adopts the principle of strict neutrality, private religious demonstrations can be limited in the public space as a mechanism to ensure that principle (case *Sahin*). However, when the public authorities directly make a religious demonstration of a majoritarian faith and it collides with an individual belief which rejects every religious conviction, the result is that the limit should be imposed on the individual right to not believe (case *Lautsi*), without taking into account the supposed neutrality or other disturbed values, as the children’s best interest. It is very difficult to make this conclusion compatible with a real and effective recognition of the freedom of

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<sup>48</sup> *Lautsi v. Italy* [GC], no. 30814/06, §72 and 74, ECHR 2011.

<sup>49</sup> Dissenting opinion of judges Malinverni and Kalaydjieva, §6 and 8.

thought and religion, which protects both the right to believe in a religion and the right to not believe in an equal manner.

But apart from its discriminatory consequences, the undefined distinction between active and passive religious symbols introduced by the Court is also inadequate because of the absolute terms it is presented. The reality of the situation is basically subjective; everything depends on the perception of the different subjects involved and the particular capacities of each one. If a religious symbol is active because can make a subject doubt about his convictions and thinking about replace them by those which the symbol represents, the critical capacity and the maturity of the subject plays an important role. There will be people more suggestible than other, so the power of the symbol will not be the same for everyone. For an adult, whose convictions are normally strong, the simply perception of a symbol from a different system of faiths rarely will have an indoctrinatory effect, so the symbol will always have a passive effect, no matter its location or size, notwithstanding the possible breach of his negative freedom of thought and religion or the principle of neutrality. On the opposite side, when the exposed to the symbol are underage children, as it is in the case, the proselytizing effect of the symbol should be assessed in accordance with their particular subjective circumstances, so the possibility of finding active symbols is higher. All of that considering that the mere presence of a religious symbol in the public space will probably not be compatible with the main principle of secularism.

The Court rejects this subjective approach to the matter and tries to put the capacity of influence of religious symbols in objective terms. According to the ruling, the subjective perception of the applicant "is not in itself sufficient" to establish a breach of Art.2 of Protocol No.1<sup>50</sup>; the problem is the Great Chamber shares this conclusion after stating the connection of this right with the freedom of thought and religion, the most subjective of the fundamental rights which protects a reality the individual defines autonomously, and whose possible violations depend only on the perception of the subject (Zucca 2013). Probably, the Court focuses the problem on the art.2 of Protocol No.1 in order to avoid considering a direct breach of the freedom of thought and religion of parents or children, situation which would have required a different final conclusion, as well as more coherent arguments. But even understanding that the only applicant's right that can be violated in this situation is the right to choose the children's religious and moral education, it does not prejudge nor determines the consequences of the presence of the crucifix on the pupils' special subjective perception, circumstance which, itself, could constitute a problem under the perspective of art.9 ECHR.

For an underage child, whose moral system is more permeable due to his immaturity, a concrete religious symbol, with no importance for an adult, can exercise pressure, making him thinking his convictions are not right because the meaning of that icon is no included in. This pressure will depend on the age and many other circumstances related to the intellectual development of each particular case, so it is

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<sup>50</sup>*Lautsi v. Italy* [GC], no. 30814/06, §66, ECHR 2011.

almost impossible to find an objective assessment rule. When the Great Chamber invokes the lack of power of the symbol in order to justify its presence in classrooms is formalizing an unrealistic standard; it misunderstands the subjective position of children and, as a consequence, tries to assess the power on indoctrination of the religious symbol from a perspective of full maturity which is not the situation of the target group of the possible proselytizing message.

If the Great Chamber had not only adopted the perspective of the parents sieved through this particular concept of the human beliefs, its final conclusion in the ruling would have been the same than the Second Section.

Taking a realistic view, the pupils, as particularly vulnerable subjects integrated inside a concrete environment that is designed to educate them, need specific and particularly protective measures oriented to avoid any unlawful interference on their best interest and their freedom to develop their personality. The result of these measures should be a neutral and pluralistic environment where no particular beliefs have more visibility than others. The Court itself recognizes that the crucifix represents unambiguously a particular system of thought, and when is placed in a prominent place, the faith it represents is occupying the main part of the educational space. Additionally, it is difficult to conceive it as a neutral, cultural or innocuous symbol; therefore, it cannot be present in a neutral space as a representation of the State.

### **IV.3. The inadequate application of the margin of appreciation doctrine**

The interpretation of the doctrine of the margin of appreciation that the Great Chamber sustains in the *Lautsi* ruling is almost a consequence of the previous proposition. If the presence of a crucifix in a classroom placed by the public authorities has no entity enough to breach any fundamental right, due to his “passive” condition, the concrete regulation of this question is not important from the perspective of the ECHR. Consequently, there is no problem for the States to regulate it however they want because its only hypothetical limit, the prohibition of indoctrination, is not applicable.

The Court justifies the employment of the margin of appreciation doctrine by a lack of European consensus on this particular issue<sup>51</sup>. This is a very recurrent statement when the ECtHR faces possible violations of the freedom of thought and religion, which are always analyzed from a conservative point of view (Mancini 2010). But in the particular case of religious interferences on the educational environment, the Court’s assertion does not correspond exactly to the reality.

It is true there is no European consensus on the specific regulations about the presence of religious symbols at schools if considering the different education legislations in detail. There is no consensus either on the different models of relationship between the States and the religious faiths, but this is a question that should

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<sup>51</sup> *Id.* at §70.

have not been introduced within the merits of the case because it is a political question at the end, not a human right's problem. However, it is possible to identify a European common standard: the respect to the negative religious freedom of the individuals (Barrero 2012), no matter the concrete position of the State with regard to the religion; this principle is a positive obligation to public authorities that would modulate the margin of appreciation<sup>52</sup>. The protection of the children's freedom of religion can be identified as a part of this duty because it is a purpose that, in the abstract, no democratic State will reject either as a target itself or as a projection of the parents' freedoms. Likewise, the prohibition of discrimination (the purpose of educational neutrality) is also a common accepted principle. If the Court had taken into account these factors, the breadth given to the margin of appreciation of the States in the question should have been drastically reduced. But in this case, the Great Chamber shows great respect for the States and little for the perspective of the parents (Zucca 2013), apart from no consideration for children.

Although there is no consensus on the specific regulatory terms of the private convictions in the public space, it is possible to find it regarding the objectives which must be respected. And this is a case about a breach of a fundamental objective: the compulsory respect to fundamental rights regardless the specific profits a State decides to give to a concrete religious faith. For this, it is false that the Court cannot assess the merits of the case. It can do it and it must do it because the question is directly related to the ECHR.

The solution adopted by the Great Chamber leaves the children's freedom of thought and religion unprotected against unlawful interferences. It renounces to impose any kind of control on hypothetical ideological pressures exerted on pupils belonging to minority groups, who are also unarmed against the influence of the majority due to their immaturity. In its previous doctrine, the Court asserted that "in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practice that religion or those who adhere to another religion"<sup>53</sup>, and the principle of secularism forbids it<sup>54</sup>. This is the conclusion when the analyzed environment is the university, where students are mature, so it is reasonable to believe that if the pupils are 8 or 12 years old the potential pressure could be higher and restrictive measures on expression of private beliefs are more justified; in fact, these measures are even necessary in order to ensure educational pluralism.

The doctrine of the margin of appreciation worked well as mechanism to protect the convictions and the freedom of thought and religion only of the majority (Mancini 2010), and the second *Lautsi* ruling reinforces this role. Its conclusions give the States full power to incorporate into the public space (the classroom) symbolic elements that

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<sup>52</sup> As expressed in the Dissenting Opinion of judges Malinverni and Kalaydjeva to the *Lautsi* Great Chamber Judgement.

<sup>53</sup> *Karaduman v. Turkey*, decision of 3 May 1993, §50, unreported.

<sup>54</sup> *Leyla Şahin v. Turkey* [GC], no. 4474/98, §116, ECHR 2005-XI.

most pupils recognizes but some of them do not, protecting the best interest of the majority but not the minority's one. The Court is legitimating the employment of mechanisms oriented to the cultural homogenization of the society through the education, which is clearly a perversion of its principal purpose at the service of children's best interest.

The main practical consequences of the wide capacity given to the States is that only those parents and pupils belonging to the dominant ideology or faith will enjoy the freedom of thought and religion, in contrast to the unjustified restriction imposed to everybody else. According to the logic employed by the Court, the right of being respected by the State in the religious field recognized in art.9 ECHR will only operate if there is a majority agreement saying the concrete impugned practice breaches this right (Ronchi 2011). On the other hand, if the breach of the freedom of conscience is obvious but the majority accepts it because only a minority is affected, it will never be considered a violation of art.9 ECHR. It is obvious the majority will never consider their practices or symbols as a distortion of a right, regardless who can be affected because the solidarity is not always present. Fundamental rights are universal protective instruments which play a special role against majority abuses; therefore, a doctrine like this has no sense because, in practice, it implies the inefficacy of the Convention.

In order to facilitate the free development of the pupils in their own ideas taking into account the parents' ones, the public educational system must show a strict neutrality. This means the State cannot be the messenger of ethical values or symbols that are not unanimously accepted, because it converts the public (common) space in the private space of the majority, which will not be perceived as theirs by the minorities. Without symbolic neutrality, those children who do not identify their beliefs with the religious icons the State supports in the name of the majority will feel they are different; consequently, they might be tempted to adopt the majority convictions in order to be accepted by the group. In fact, it is possible to understand that, when the public authorities put a religious symbol dominating a classroom, they are sending to the pupils the message that they should accept the beliefs it represents if they want to be like the others. With this attitude, the State is offering children a "social advantage", their full social integration, if they abandon their atheists, agnostic or different religious faith and accept the majority convictions. This is exactly what the ECtHR defined time ago as "improper proselytism"<sup>55</sup>, which can rightfully be limited by States without violating the art.9 ECHR. Against this great capacity given to the States to condition the children's moral values, the parent's capacity of instilling different values might be overcome.

As aggravating factor of this case, the proselytizing conduct is not implemented by a person, who could develop it as a part of his religious freedom, but by the Italian State, which should respect neutrality because its Constitution embodies the fundamental principle of secularism. On the contrary, the arguments of the Italian

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<sup>55</sup> *Kokkinakis v. Greece*, 25 may 1993, §48, Series A no.260-A; *Larissis and Others v. Greece*, 24 February 1998, §45, Reports 1998-I.

Government's appeal before the Great Chamber proclaim some kind of "sociological confessionalism" as a duty to give a preferential treatment and visibility to the majority religion in the public spaces despite it is not the official faith of the State; after this, the Government does not hesitate to put it ahead to the validity of the fundamental rights using as an excuse the concept of "national particularity"<sup>56</sup>. The Italian authorities are disregarding the principle of secularism and causing a constitutional mutation which modifies the content of the principle of secularism into a duty of submission to a concrete religion.

Under these circumstances, the public sphere is no more the place of all citizens to become only the place of the majority, who merely tolerates the existence of other ethics options and considers the public spaces are the natural place to promote a concrete ideology beyond the fundamental rights. According to the conclusions of the Great Chamber, the majority can also place the dominant faith promotion before the specific needs of a vulnerable group, the underage children, whose best interest has no consideration if it does not match the dominant religion's ideas. Against these dangerous consequences, the answer given by the ECtHR is the acceptance of the Italian Government's arguments, no matter the consequences<sup>57</sup>. With the assumption of the idea that majority convictions and symbols, which are not unanimous, can have a preferential place in the public space, the Great Chamber revokes a judgement that was "an important step forward in taking minority rights seriously, even when this requires a rethinking of traditional domestic equilibria" based on the European religious homogeneity (Mancini 2010: p. 26). The result is a timorous doctrine that results completely useless as mechanism of protection of children's fundamental rights.

## V. CONCLUSIONS

The Great Chamber judgement revoking the first instance Court decision in the *Lautsi* affair is a step backward in the ECtHR doctrine. The excessive scope it gives to the national margin of appreciation and the better consideration of a concrete belief system against others it develops in its arguments are very questionable arguments, but, above these reasons and in a veiled form, the judgement declares the renouncement of the Court to protect the freedom of thought and religion of children in a concrete manner. Indeed, the Great Chamber opts in favor of other principles before their best interest, ruling on a question about underage children without speaking about children's interests and rights.

Neither of the two Court rulings in this case incorporates specifically in their premises or values the principle of children's best interest, but the first ruling shows a partial and instrumental approach to it. In its arguments, the Second Section analyses the possible direct infringement of the pupils' freedom of thought and religion, and this is linked with the need of a neutral and impartial educative environment, which is one of the essential instruments for achieving children's free personal development and,

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<sup>56</sup> *Lautsi v. Italy* [GC], no. 30814/06, §36-37, ECHR 2011.

<sup>57</sup> *Id.* at §71.

consequentially, to benefit their best interest as a result of the education in real freedom. But in the conclusion of the judgment, the Second Section only considers a violation of the art.2 of Protocol No.1 (the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions), so it is not possible to say children's rights are a real focus of attention for the Court themselves. The final result of the argumentative development spoils the content of the ideas exposed by reducing the final conclusion to a problem of parent's rights strictly. The Court is suggesting the pupil's freedom of conscience is only a direct projection of parent's one with no individual entity, which is to say that children's right should not be protected by themselves, but only as an object of parental authority.

This conclusion is much more visible in the Great Chamber judgement, whose arguments contain almost no references to children's legal position in the case. In fact, the Second Section shows a particular perspective in its rulings about religions symbols (cases *Dahlab* and *Lautsi*) that the Great Chamber does not share now, but apparently previously did (case *Sahin*).

If the first ruling is not perfect, it contains, at least, a transversal consideration of the subjective position of children and appoints mechanisms that, *de facto*, impact positively in the protection and the promotion of their best interest in application of an, apparently consolidated, doctrine about the neutrality of public educative spaces. The final *Lautsi* judgement, on the other hand, seems to be more oriented to give a politically correct solution and to not spite Catholic stakeholders than to address the real doubt: if a religious symbol has any kind of proselytizing effect on young children and if this is acceptable regarding the compulsory protection of their best interest.

The second ruling reveals an incomplete and reductionist approximation to the problematic question, thinking the problem is limited to the impact of a potential "official" indoctrination of pupils on parent's right to choose their moral and religious education in a secularist system. This approach ignores the most vulnerable element, the child, who is the primary target of educative public policies and decisions. And this is, at the end, a controversy about the freedom of thought and religion framed by the particular characteristics, needs and subjects of the educational context.

When reading the Great Chamber judgement, it is obvious the pupils' subjectivity does not deserve the attention of the Court. It does not hesitate to change radically the opinion about a measure which directly concerns children without justifying or explaining how the new position adopted benefits or encourages their best interest or rights. The Court is strictly applying a previous doctrine that says the art.2 of Protocol No.1 is *lex specialis* in relation to art.9 of the ECHR, and this circumstance is true, but only under the perspective of the parents regarding the State obligation to respect the parental guide right. This doctrine should not be considered as a correct approach to the problem of the presence of religious symbols in the public educative space because it forgets the implications on the freedom of thought and religion of children itself, which is a different right than parents one.



The freedom to choose the religious and moral education of the own children has two main readings. As a right to shape the children's conscience according to the own convictions, determining its contents without any margin of freedom for the child, or as an instrumental right, consequence of the freedom of conscience, but basically recognized to serve to the correct and free formation of children's conscience. The most rights-based interpretation is the second one, because the limitations on the children's rights are only consequence of their lack of adulthood, and any measure oriented to substitute their autonomy may be only justified as a way to reach it in the future. When the Court subsumes the pupils' freedom of conscience under the art.2 of Protocol No.1 is, in essence, recognizing their parents a full capacity to determine from outside which are the children's interests, because they do not have any right to be educated in freedom (or, at least, the Court does not consider it).

The Great Chamber incomprehension of the meaning and objectives of the fundamental rights systems when applied to the children also influences in the conclusion, especially when it says that it is a question that falls into the margin of appreciation of the States. Under this point of view, the Court is converting a matter of rights in an issue about the systems of relationship between the States and the religious faith, creating an artificial problem and, later, trying to elude it. But the most important, it is renouncing to protect a concrete right, the freedom of thought and religion, allowing the public authorities to adopt any measure they consider appropriate according to their own circumstances or the balance of internal powers. This circumstance has two critical consequences on the configuration of the protection of freedom of thought and religion, especially for the children. The first one is that, according to the Great Chamber doctrine, a State can decide everything it wants about the presence of private ethics symbols in the public space, no matter if it disturbs anyone's conscience or the possible breach of the duty to protect the children's best interest through a neutral educational system oriented to create free citizens.

The second consequence is that, under these principles, the majority symbols are legitimated to be imposed, overriding any strange, different or minority belief. In addition, the Court accepts a State can freely act as an instrument of this purpose instead of respecting the plurality, employing the educational system as a mechanism to publicize religious icons that might orientate the young generations to these convictions. Adults can, more or less, defend themselves against this interference, but the more suggestible children probably cannot. When education becomes an indoctrination system, circumstance that is not a problem for the Great Chamber, the children's best interest is annulled by the particular interests of the majority and, consequently, the free development of their personality is not guaranteed. The promotion of a concrete ideology, if it is majoritarian, seems to be more important for the Court than the education in freedom. Under this proposition, the State can rightfully employ the education to promote the cultural homogenization of its population with no limits, and this behavior will not violate the freedom of conscience, even if it is clearly contrary to the pluralism that a democratic society needs to be considered as such.

The only interest of the Great Chamber building its argumentation is to conclude there is not proselytism in the exposition of a Christian symbol in the public space because this kind of icons cannot transmit any message, when this is, precisely, its natural function. For this purpose, the Court has no problem to employ an equivocal concept of “secularism”, assimilating it to a rejection of any religious conviction (as the judge Power does in his concurring opinion) when the real meaning of the concept is neutrality. In the same way, it seems to be very concerned to avoid any concession to subjectivity, constantly seeking in its judgement objective reasons to cover up a suspicious approach.

The first *Lautsi* judgement gave diffident principles for building a concept of children’s best interest with European scope, particularly in the educative environment, but the second one not only contains nothing relevant, but it complicates this task. The Great Chamber ruling also leaves in the vagueness the content and position of children’s rights in the European system. Finally, it changes the previous doctrine about religious symbols at school, based in the need for neutrality, without giving any substantive argument, which is not very correct under the point of view of the legal argumentation and makes almost impossible to integrate all the ECtHR judgments about religious symbols at school in a consistent doctrine.

If the final solution is that every State can adopt the measures it considers without any restriction and individual rights cannot operate as a limit when the margin of appreciation is invoked, the only thing people can reasonably do is to ask what the ECtHR is for. At the end, the impression is that if the exposed symbol had belonged to any other religion different to Christianity, the conclusion would have been different in the interest of neutrality and pluralism. In any case, the Court has lost a good opportunity to take the children’s rights seriously.

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