

## **Lift High the Cross? *Lautsi v. Italy* in American Perspective**

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The European Court of Human Rights has just upheld Italy's policy of displaying crucifixes in its public school classrooms. In *Lautsi v. Italy*, an atheistic mother of two public school children challenged this policy, in place since 1924. After losing in the Italian courts, she appealed to the European Court of Human Rights, arguing that the presence of these crucifixes in public schools violated her and her children's rights to religious freedom and to a secular education guaranteed by the European Convention on Human Rights. On November 3, 2009, an unanimous seven-judge chamber of the European Court held for Ms. Lautsi. On March 18, 2011, the Grand Chamber reversed, and held 15-2 in favor of Italy.

The Court stated clearly that the crucifix is a religious symbol, that atheism is a protected religious belief, and that public schools must be religiously neutral. But the Court held that a "passive display" of a crucifix in a public school classroom was no violation of religious freedom – particularly when students of all faiths were welcome in public schools and free to wear their own religious symbols. The Court held further that Italy's policy of displaying only the crucifix was no violation of religious neutrality, but an acceptable reflection of its majoritarian Catholic culture. With European nations widely divided on whether and where to display various religious symbols, the Court concluded, Italy must be granted a "margin of appreciation" to decide for itself how and where to maintain its Christian traditions in school.

The *Lautsi* case echoes many familiar arguments that the United States Supreme Court has used over the past three decades to maintain traditional displays of crèches, crosses, and Decalogues on government property. While not entirely convergent in their religious symbolism cases, the American and European high courts now hold six teachings in common.

First, tradition counts in these cases. In American courts, older religious displays tend to fare better than newer displays. The longstanding customary presence of a religious symbol in public life eventually renders it not only acceptable but indispensable to defining who we are as a people. In *Lautsi*, Judge Bonello put this argument strongly in his concurrence: "A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people."

Second, religious symbols often have redeeming cultural value. American courts have long recognized that a Decalogue is not only a religious commandment but also a common moral code, that a cross is not only a Christian symbol, but also a poignant memorial to military sacrifice. When passively and properly displayed, the meaning of a

symbol can be left in the eye of the beholder – a sort of free market hermeneutic. The *Lautsi* court echoed this logic. While recognizing the crucifix as religious in origin, the Court accepted Italy's argument that "the crucifix also symbolized the principles and values" of liberty, equality, and fraternity which "formed the foundation of democracy" and human rights in Italy and well beyond.

Third, local values deserve some deference. In America, the doctrine of federalism requires federal courts to defer to the practices and policies of individual states, unless there are clear violations of federal constitutional rights to free exercise and no establishment of religion. The Supreme Court has used this doctrine to uphold the passive display of crosses and Decalogues on state capitol grounds. The *Lautsi* Court uses the European "margin of appreciation" doctrine in much the same way. Lacking European consensus on public displays of religion and finding no coerced religious practice or indoctrination in this case, the Court left Italy to decide for itself how to balance the religious symbolism of its Catholic majority and the religious freedom and education rights of its atheistic minorities.

Fourth, religious freedom does not require the secularization of society. The United States Supreme Court became famous for its image of a "high and impregnable wall of separation between church and state," that left religion hermetically sealed from political life and public institutions. But the reality today is that the Court has abandoned much of its strict separatism and now allows religious and non-religious parties alike to engage in peaceable public activities, even in public schools. The European Court of Human Rights likewise became famous for promoting French-style laïcité in public schools and public life, striking down Muslim headscarves and other religious symbols as contrary to the democratic "message of tolerance, respect for others, and equality and non-discrimination." *Lautsi* suggests a new policy that respects the rights of private religious and secular groups alike to express their views, but allows government to reflect democratically the traditional religious views of its majority.

Fifth, religious freedom does not give a minority a heckler's veto over majoritarian policies. Until recently, American courts allowed taxpayers to challenge any law touching religion even if it caused them no real personal injury. This effectively gave secularists a "veto" over sundry laws and policies on religion -- however old, common, or popular those laws might be. The Supreme Court has now tightened its standing rules considerably, forcing parties to make their cases for legal reform in the legislatures and to seek individual exemptions from policies that violate their beliefs. *Lautsi* holds similarly. It recognizes that while the crucifix may cause offense to Ms. Lautsi, it represents the cherished cultural values of millions of others, who in turn are offended by her views. But personal offense cannot be a ground for censorship. Freedom of religion and expression requires that all views be heard in public life.

Finally, religious symbolism cases are serious business. It's easy to be cynical about these cases – treating them as much ado about nothing, or expensive hobbyhorses for cultural killjoys or public interest litigants to ride. But that view underestimates the extraordinary luxury we now enjoy in the West to be able to fight our cultural contests over religious symbols in our courts and academies, rather than on our streets and battlefields. In centuries past in the West -- and in many regions of the world still today -- disputes over religious symbols often lead to violence, sometimes to all-out warfare. Far more is at stake in these cases than the fate of a couple of pieces of wood nailed together. These cases are essential forums to work through our deep cultural differences and to sort out peaceably which traditions and practices should continue and which should change.

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