



WRITTEN SUBMISSIONS

*submitted to the European Court of Human Rights
in the case of*

Union of Atheists et al. v. Greece
(Applications Nos. 19150/20 and 11122/25)

Grégor Puppink, Director,
Nicolas Bauer, Research Associate.

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The applicants are the Union of Atheists and some of its activists. According to its bylaws, the association's objectives are to achieve "the separation of church and state," to "further develop the community of non-religious, atheist, and agnostics," and "defending [...] the rights" of these individuals (Art. 2)¹. The primary means of achieving these objectives, as set forth in the association's bylaws, is through legal action (Art. 3).

The present petition to the Court is part of these legal actions. It is a strategic lawsuit, that is, a legal action aimed at a political objective: to sever the historical and constitutional link between the State and the Greek Orthodox Church.

The petitioners object to the presence of religious symbols in Greek courtrooms. More specifically, they challenge the "Christian orthodox icon of Jesus Christ" hanging above the presiding judge's seat in the plenary chamber of the Council of State. In their view, this icon of Christ Pantocrator—a depiction dating from the 5th century—"would link the courtroom decorum to the interveners" as well as "would hinder their right to a fair trial and their access to an impartial tribunal." However, the petitioners do not allege that these icons exerted any influence whatsoever on the judicial decisions concerning them.

The petitioners raised this issue in connection with lawsuits they filed against ministerial decisions, some of which established the content of religious education courses in schools, while others provided for the inclusion of religious affiliation on high school diplomas and certificates. During these proceedings, the petitioners requested that the icons be removed or, failing that, that the hearing be held in a room without icons. Their requests were declared inadmissible by the Greek Council of State, which refused to grant an exception for the petitioners. The petitioners, like all Greek litigants, thus attended their hearings in a courtroom containing icons.

By maintaining religious icons in the courts, the applicants contend that Greece is violating the principle of the impartiality of the court (Article 6 § 1), freedom of conscience and religion (Article 9), and the prohibition of discrimination based on religion (Article 14 in conjunction with Articles 6 § 1 and 9).

These observations show that such a question is of a constitutional nature (1) and that the icon is a "passive" religious symbol (2). They will then review the applicable principles concerning judicial impartiality (3), the State's duty of impartiality as the organizer of religious practice (4), and the relationship between these two treaty requirements (5). Finally, these observations will demonstrate that the presence of icons does not infringe upon the freedom of belief of litigants—including their right to adhere to the principle of state secularism (6)—and falls within the scope of national discretion (7). In conclusion, the ECLJ draws the Court's attention to the political necessity of avoiding a second "*Lautsi* case" (8).

1. A Constitutional Issue

1.1. The Relationship Between the Greek Constitution and the European Convention

Greece signed the Convention in 1950 and ratified it in 1953. At the same time, Greece adopted a new Constitution (1952), promulgated "In the Name of the Holy and Consubstantial and Indivisible Trinity." Title I, "Concerning Religion," included, notably, the provision that "The established religion in Greece is that of the Eastern Orthodox Church of Christ" (Art. 1) and the recognition of "Our Lord Jesus Christ" as its head (Art. 2).

¹ The bylaws of this association can be viewed on this page:

https://union.atheia.gr/atheist_union/statute_gr/

During the military regime of the colonels (1967–1974), Greece suspended ten articles of its Constitution (1967)², adopted a new Constitution (1968), and denounced the Convention (1969)³.

After the fall of the military regime, the Greek provisional government ratified the Convention for the second time on November 28, 1974, even before the promulgation of the new Constitution on June 11, 1975. The European Convention thus served as a legal and moral benchmark for the 1975 Constitution.

The latter, which remains in force, was once again promulgated “In the Name of the Holy and Consubstantial and Indivisible Trinity” and, like the 1952 Constitution, includes the provision stating that “The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ” and the recognition of “Our Lord Jesus Christ as its head” (Art. 3).

Thus, whether in 1952–1953 or in 1974–1975, Greece acceded to the Convention while adopting Constitutions that recognized the Eastern Orthodox Christian religion as the dominant one and Jesus Christ as the supreme spiritual leader. No reservation or declaration on this matter has been deemed necessary, either at the time of accession or to this day.

This link between the 1975 Greek Constitution and the European Convention is a concrete expression of the preamble to the Statute of the Council of Europe, which affirms that member states are “reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”⁴. In its third-party intervention in the case of *Lautsi v. Italy*, the Greek Government argued that these values underlie the Convention and are consistent with the fact that Greece’s national identity is shaped by the Greek Orthodox Christian religion⁵.

1.2. The Presence of Icons in Courts: A Custom Derived from the Constitution

According to Article 1^{er} of the Greek Civil Code, custom is a source of law.

The presence of icons in courthouses is a long-standing practice. Greek society shares the conviction that this practice has legal standing. It therefore constitutes a custom.

Due to the aforementioned provisions of the Constitution (1.1.), this custom derives from it. It even predates the Constitution, which further reinforces its legitimacy.

1.3. The Distinction Between the State’s Essence and Its Actions

In ancient Greece, a religious belief—concerning the soul and death—formed the foundation of the entire social order⁶. Everything was “religious,” and “religion” was everything; in other words, it had no individual dimension. This did not prevent Enlightenment philosophers, such as Voltaire and Rousseau, from viewing this context as a model of tolerance⁷. Nevertheless, the nature and actions of the state, in religious matters, could not be distinguished from one another.

² Notification contained in a letter from the Permanent Representative of Greece, dated May 25, 1967, registered with the General Secretariat on May 25, 1967, and including a copy of Royal Decree No. 280 concerning the declaration of a state of siege in the territory and the suspension of certain articles of the Constitution.

³ Denunciation of the Convention by Greece in a Note Verbale dated December 12, 1969, registered with the General Secretariat on December 17, 1969.

⁴ Statute of the Council of Europe, London, May 5, 1949, preamble, § 2.

⁵ *Lautsi and Others v. Italy* [GC], No. 30814/06, March 18, 2011, §§ 7 and 8.

⁶ This is the thesis of the book: FUSTEL de COULANGES, Numa Denis, **La Cité antique**, Paris, Le Club du Meilleur Livre, 1959.

⁷ See: VOLTAIRE, **Treatise on Tolerance**, on the occasion of the death of Jean Calas, 1763, chap. VII, “Whether Intolerance Was Known to the Greeks,” pp. 40–42; **Essay on Manners**, 1756. In: *Complete Works*, Garnier, Paris, 1877,

The current Greek context separates the “being” of the state—which is rooted in a historical religious tradition—from the “action” of the state, which protects religious freedom. Thus, the Greek Constitution of 1975 enshrines freedom of religious conscience, non-discrimination on the basis of religion, and equal freedom of worship (Art. 13).

The constitutional identity of the state (being) is thus reconciled with the requirements of the Convention regarding respect for rights and freedoms (action). In its judgment in *Lautsi v. Italy*, the Grand Chamber of the Court upheld this reasoning⁸. In fact, the ECHR has never condemned the existence of an official religion in a State⁹ and explains that it does not conceive of any obligation on the part of the State that would be “likely to diminish the role of a faith or a Church with which the population of a specific country has historically and culturally been associated”¹⁰.

Similarly, in its General Comment No. 22, the United Nations Human Rights Committee does not condemn “The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population”¹¹.

1.4. The Court’s Prudent Approach to Matters of Constitutional Identity

The Court has previously ordered the amendment of a constitutional provision in the case of a State that had committed to making such an amendment at the time of its accession to the Convention¹².

In another case, a constitutional amendment appeared necessary to comply with a Court judgment, but the Court did not order such an amendment¹³. The State in question and the Committee of Ministers exchanged views on a possible draft constitutional amendment, in accordance with domestic procedures and thus respecting the State’s sovereignty¹⁴. The draft amendment necessary to implement the Court’s judgment concerned a technical matter.

This case differs from the two previous cases. On the one hand, Greece has never sought to challenge the place reserved for the Orthodox religion in the Constitution; on the other hand, the presence of icons in courthouses is part of Greece’s constitutional identity and not a technical matter.

vols. 11–13. See also the discussions in the following works, which cite numerous Enlightenment philosophers: GRIMALDI, Nicolas, *Reason and Religion in the Age of the Enlightenment*, Paris, Berg International, 2014, pp. 17–19; van CRUGTEN-ANDRÉ, Valérie, *Voltaire’s “Treatise on Tolerance”: A Champion of the Enlightenment Against Fanaticism*, Paris, H. Champion, 1999, pp. 117–123.

⁸ See on this subject: PUPPINCK, Grégor, “The *Lautsi v. Italy* Case: On the Issue of Crucifixes and Freedom of Religion Before the European Court of Human Rights.” In: d’ONORIO, Joël-Benoît (ed.), *Freedom of Expression and Freedom of Religion*, proceedings of the symposium of the Catholic Jurists of France, Téqui, Paris, 2013. Several of the points raised in these observations are inspired by this article.

⁹ See, in particular, on this subject: *Ásatrúarfélagið v. Iceland* (dec.), No. 22897/08, Sept. 18, 2012, para. 27.

¹⁰ *Members of the Congregation of Jehovah’s Witnesses in Gldani and Others v. Georgia*, No. 71156/01, May 3, 2007, para. 132.

¹¹ United Nations Human Rights Committee (HRC), General Comment No. 22, Article 18, CCPR/C/21/Rev.1/Add.4, Sept. 27, 1993, para. 9. See also: BIELEFELDT, Heiner, “Report of the Special Rapporteur on freedom of religion or belief,” A/HCR/19/60, Nineteenth Session of the UN General Assembly, Dec. 22, 2011, §§ 63–64: “the concept of a state religion is not prohibited per se under international human rights law.” Indeed, this concept may have no other consequence than “the attribution to a religion of a more or less symbolic status of superiority” without being synonymous with “rigid measures aimed at protecting the predominant role of the state religion against any competition [...] or against any public criticism.”

¹² *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, Dec. 22, 2009, §§ 21–23 and 49. See the Committee of Ministers’ follow-up report on the implementation of this judgment.

¹³ *Mugemangango v. Belgium* [GC], No. 310/15, July 10, 2020.

¹⁴ *Ibid.* See the Committee of Ministers’ follow-up file on the execution of this judgment.

2. A “passive” symbol

2.1. A Recap of the *Lautsi v. Italy* Case Law

In the case of *Lautsi v. Italy*, the Grand Chamber ruled that the crucifix was an “essentially passive” religious symbol¹⁵ that did not entail any coercion and whose impact was not sufficient to infringe upon the (negative) freedom of religion of the students and their mother, as guaranteed by the Convention and interpreted by the Court. The Grand Chamber thus adopted the term used by the Italian government, which characterized this symbol as passive in that it requires no action, prayer, or reverence on the part of those who see it. The Grand Chamber clarified that in particular, the crucifix “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities”¹⁶. It did not endorse the Chamber’s judgment, which had characterized the crucifix as a “powerful external signals”¹⁷.

2.2. The Significance of Icons in Greece

In its third-party intervention in the case of *Lautsi v. Italy*, the Greek Government explained its view of the presence of religious symbols in public buildings. It demonstrated that the religious dimension of the cross was, in this case, passive and had no impact on rights and freedoms:

12. [...] the message of the cross is one that can be interpreted independently of its religious dimension; it consists of a set of principles and values that form the foundation of democracy and Western civilization, and indeed it is no coincidence that the cross appears on the flags of several European countries. Consequently, the symbol of the cross can be perceived as representing values that are also shared by those who, without being of the Christian faith, adhere to the European heritage of values. Thus, its display in a public place, taking into account average sensibilities (the only ones targeted by the law) and local tradition, could never in and of itself constitute an infringement on the rights and freedoms of others. Thus, the cross can be understood not only as a religious symbol, but also as a cultural and identity symbol. The cross represents the source of a large portion of the “spiritual and moral values that are the common heritage” of the peoples of the Member States.

13. Furthermore, the presence of a symbol in no way obliges a student to follow a particular religion, nor to look at it, nor to attach any significance to it. [...]

14. Imposing on a state the obligation to remove a religious symbol that already exists and whose presence is justified by the country’s tradition implies a negative presumption. One must ask whether it is the mere “passive” presence of a crucifix that disturbs the conscience of a non-believer, or whether it is rather the very demand to remove it that reveals intolerance toward the religious dimension. If the impact of the silent presence of an object in public space truly constituted a psychological disturbance of such magnitude as to constitute a violation of religious freedom, then all religious symbols found in the squares and streets of our cities would also have to be banned immediately, since such a presence would likewise cause widespread offense and emotionally disturb young citizens. The effect of the approach chosen by the Chamber would be that the religious symbols displayed in public would automatically carry a negative connotation, since they would be considered capable of violating religious

¹⁵ *Lautsi and Others v. Italy* [GC], supra, § 72.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, § 73.

freedom and psychologically disturbing others, thereby prompting people to be wary of them or even hostile toward them. [unofficial translation]

As with the cross, the icon is an essentially passive symbol in the context of a Greek courtroom. The symbolism of Christ as Judge does not claim to have any impact on the judgment. By definition, Christ's judgment takes place in heaven, after death; in the meantime, here on earth, it is the courts that pass judgment. Assuming that the presence of an icon conveys an earthly message, that message is rather favorable to the defendant, for it is a message not only of justice but also of mercy. In a well-known episode from the Gospel, for example, Jesus Christ secured forgiveness for the adulterous woman who was about to be stoned.

In its aforementioned third-party submission, the Greek Government even added that it is the removal of this religious symbol that would infringe upon rights and freedoms. Thus,

26. [...] A conception of neutrality that would require the removal of a traditionally present religious symbol, rather than opening a dialogue toward the understanding and tolerance that characterize pluralism, would amount to a denial of that very freedom and would ultimately exclude the religious dimension of society.

28. [Such a removal would] inevitably distort the concept of neutrality and destabilize situations where a certain degree of concreteness and discretion in decision-making is necessary, particularly if one is to take into account the multiple demands that States face in this area, which requires a realistic and balanced approach.

3. The Impartiality of the Judge

3.1. The Absence of an Obligation of Neutrality on the Part of the Court

Article 6 § 1 of the Convention is clear. It recognizes a personal right, sets forth three characteristics of courts—independence, impartiality, and establishment by law—and defines their role. It also refers to the courtroom, specifying the grounds on which States may restrict access to it by the press or the public.

If States had intended to create an obligation to remove from courts any symbols with a religious or philosophical (Masonic) dimension, they would have specified in the Convention that courts or courtrooms must be neutral.

3.2. Subjective and Objective Impartiality

According to the Court,

As a rule, impartiality denotes the absence of prejudice or bias. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say, by ascertaining whether, quite apart from the personal conduct of any of its members, the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality¹⁸.

¹⁸ *Denisov v. Ukraine* [GC], No. 76639/11, Sept. 25, 2018, § 61. See the following report on this subject: BAUER, Nicolas, PUPPINCK, Grégor, [“The Impartiality of the ECHR—Problems and Recommendations,”](#) ECLJ, 2023, pp. 15–17.

3.3. “Verifiable facts” relating to a judge or the composition of the court

The Court has clarified these two approaches in numerous rulings, focusing on the impartiality of the judge and without considering that a court could lack impartiality independently of the judges who comprise it or the rules governing its composition¹⁹. Thus, in examining a judge’s impartiality, the Court has consistently considered verifiable facts relating to the judge’s conduct (objective impartiality) or personal convictions (subjective impartiality)²⁰.

When the issue did not concern the conduct of a specific judge, the Court assessed the nature and extent of “hierarchical or other links with another actor in the proceedings” or the consequences of “the exercise of different functions within the judicial process by the same person”²¹.

The Court further held that “the standpoint of the person concerned is important but not decisive” and that “what is decisive is whether this fear can be held to be objectively justified”²².

The consequence of a legitimate reason to fear a lack of impartiality is the obligation for the judge in question to recuse himself or herself²³. States must establish procedures governing recusal, with the aim of “ensuring the absence of actual bias” and “removing any appearance of partiality”²⁴.

According to the Court, “Article 6 § 1 of the Convention imposes an obligation on every national court to check whether, as constituted, it is “an impartial tribunal” within the meaning of that provision where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit”²⁵. Once again, therefore, it is the composition of the court that is decisive in determining its impartiality.

The Court has, however, never assessed the potential and general effect that the layout or decoration of a courtroom might have on all courts in a country, regardless of the judges who sit on any of those courts. For applicants to be recognized as victims within the meaning of Article 34 of the Convention, they must specifically demonstrate the court’s lack of impartiality in a particular case.

4. The State’s Duty of Impartiality as the Organizer of Religious Practice

4.1. A duty of impartiality regarding the State’s actions

In case law, “the Court has frequently emphasized the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs,” which it refers to as the “State’s duty of neutrality and impartiality”²⁶. It is in its capacity as an organizer that the State has this duty, without its identity being called into question (see 1.3).

4.2. The criterion of the effect on freedom of religion

Since the State’s duty of impartiality relates to its actions, the Court’s review is based primarily on an assessment of the effects of the State’s action on freedom of religion. Thus, the Court has verified

¹⁹ *Denisov v. Ukraine* [GC], supra, §§ 61–63; *Micallef v. Malta* [GC], No. 17056/06, Oct. 15, 2009, § 93; *Wettstein v. Switzerland*, No. 33958/96, Dec. 21, 2000, §§ 43–44; *Nicholas v. Cyprus*, No. 63246/10, Jan. 9, 2018, §§ 49–55.

²⁰ *Ibid.*

²¹ *Nicholas v. Cyprus*, supra, § 52 ; *Kyprianou v. Cyprus* [GC], No. 73797/01, Dec. 15, 2005, § 121.

²² See, for example: *Nicholas v. Cyprus*, supra, § 52.

²³ *Micallef v. Malta* [GC], supra, § 98; *Nicholas v. Cyprus*, supra, § 54.

²⁴ *Nicholas v. Cyprus*, supra, § 55 (free translation).

²⁵ *Cosmos Maritime Trading and Shipping Agency v. Ukraine*, No. 53427/09, June 27, 2019, para. 81.

²⁶ See, for example: ECHR, *Bayatyan v. Armenia* [GC], No. 23459/03, July 7, 2011, para. 120; *S.A.S. v. France* [GC], No. 43835/11, July 1, 2014, para. 127. This neutrality is required of the State insofar as it exercises “regulatory power” in religious matters and insofar as it necessarily maintains a “relationship with the various religions, denominations, and beliefs” (*Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, Dec. 13, 2001, para. 116).

that the State fulfills this duty in the many situations where it is required to limit freedom of religion in order to reconcile the interests of different groups²⁷.

In the case of *Lautsi v. Italy*, the Grand Chamber examined the effects of the crucifix on freedom of religion and the other rights and freedoms at issue:

66. The Court has no evidence before it regarding the possible influence that the display of a religious symbol on classroom walls might have on students; it cannot therefore be reasonably asserted whether or not it has an effect on young people, whose beliefs are not yet firmly established (...). The applicant's subjective perception alone is not sufficient to establish a violation of Article 2 of Protocol No. 1.

74. Furthermore, the effects of the increased visibility that the presence of crucifixes gives to Christianity in the school environment must be further qualified in light of the following factors. On the one hand, this presence is not associated with compulsory instruction in Christianity (see the comparative law analysis set forth in the aforementioned Zengin judgment, § 33). On the other hand, according to the Government's statements, Italy simultaneously opens school premises to other religions. The Government notes, in particular, that students are not prohibited from wearing the Islamic headscarf or other symbols and clothing with religious connotations; arrangements are in place to facilitate the reconciliation of schooling with non-majority religious practices, the beginning and end of Ramadan are "often celebrated" in schools, and optional religious instruction may be provided in schools for "all recognized religious denominations" (paragraph 39 above). Furthermore, there is no indication that the authorities are intolerant toward students who follow other religions, are non-believers, or hold philosophical convictions not linked to a religion.

Furthermore, the applicants do not claim that the presence of crucifixes in classrooms encouraged the development of teaching practices with proselytizing overtones, nor do they argue that the second and third applicants were confronted by a teacher who, in the performance of his or her duties, allegedly relied on that presence in a biased manner.

Similarly, in a courtroom, there is no reason to question the presence of religious symbols if no impact on the freedom of religion or other freedoms of litigants is observed. The situation in Greek courts in this regard is discussed below (6.2).

5. The Relationship Between Judicial Impartiality and the State's Duty of Impartiality as the Organizer of Religious Practice

5.1. Confusion surrounding the concept of impartiality

The applicants distinguish their case from *Lautsi v. Italy* by noting that it "does not concern the educational context but the court itself, a place where religious neutrality must be absolute in order to guarantee the impartiality of judges." [unofficial translation] However, such a requirement of neutrality is not provided for in Article 6 § 1 (see 3.1 above). Furthermore, "absolute religious neutrality" would imply focusing on the very nature of the State and not merely on its actions, which is also not provided for by Article 9 (see 1.3. and 4 above).

²⁷ ECHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, supra, §§ 115–116. See, for example, this case involving disagreements between the Orthodox Patriarchates of Kyiv and Moscow: *Sviato-Mykhailivska Parafiya v. Ukraine*, No. 77703/01, June 14, 2007, §§ 123, 139, and 141–152.

It seems essential in this case to clearly distinguish between the impartiality of the judge (3) and the State's duty of impartiality as the organizer of the practice of religions (4). According to the case law cited above (points 3 and 4), the Court avoids using the same concept of impartiality without specifying whether it refers to that under Article 6 § 1 of the Convention or to a judicial interpretation of Article 9 of the Convention.

5.2. The Implications for the Court of the State's Duty of Impartiality as the Organizer of Religious Practice

As the Court points out,

*the judiciary, while not being part of ordinary civil service, is nonetheless part of typical public service. A judge has specific responsibilities in the field of administration of justice which is a sphere in which States exercise sovereign powers. Consequently, the judge participates directly in the exercise of powers conferred by public law and performs duties designed to safeguard the general interests of the State*²⁸.

It is in their capacity as a state authority that judges may be called upon to participate in the State's role of organizing the practice of religion in an impartial manner. The Court's only decision in this area (*Galina Pitkevich v. Russia*) was to declare manifestly ill-founded the application of a judge who had been dismissed due to specific activities carried out in the exercise of her judicial duties, during which she expressed her religious beliefs²⁹. In reaching this conclusion, the Court examined the applicant's conduct, which included expressing her views on various moral and religious issues in the course of her duties, invoking Christian morality to assist litigants, promising parties a favorable outcome in their proceedings if they converted to her religion, praying publicly during hearings, and recruiting members of her religious community as colleagues or associates³⁰. The Court then found "that the applicant was dismissed for her specific activities which were found to be incompatible with the requirements of the judicial office" and that "[her] belonging to the Church or holding religious views, as such, did not constitute a basis for the dismissal."

For a judge, the duty of impartiality is called into question when it can be established that his conduct concretely demonstrates religious favoritism. It was thus established that this judge had, in judicial proceedings, "promoted the Church in damage of the State interest to protect the rule of law"³¹.

By way of comparison, the Court held that the case of *Galina Pitkevich v. Russia* is distinct from the case of *Vogt v. Germany*, "where the Court found a violation of Article 10 of the Convention because a civil servant had been dismissed on the ground of the mere membership of a communist party, with no . . . criticism being levelled at the way she had actually performed her duties as a teacher."³². Indeed, the case of *Galina Pitkevich v. Russia* involved a "precisely defined" breach by the applicant of "her statutory duties as a judge, namely her specific actions while performing her judicial functions"³³. Since Russia had dismissed this judge, the Court had also taken into account its "margin of appreciation in this respect"³⁴.

²⁸ *Pitkevich v. Russia* (dec.), No. 47936/99, Feb. 8, 2001.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*; *Vogt v. Germany*, No. 17851/91, Sept. 26, 1995.

³³ *Pitkevich v. Russia* (dec.), supra.

³⁴ *Ibid.*

5.3. Religious neutrality of the courts: a discretion, not an obligation, for States

The Court had already held, in the case of *Hamidović v. Bosnia and Herzegovina*, that a State could legitimately restrict the freedom to manifest a religion or belief in a court in order to pursue the objective of defending secular and democratic values, provided that this objective could be linked to the legitimate aim of protecting the rights and freedoms of others³⁵. Thus, the pursuit of a certain degree of religious neutrality in the courts is a power that States may exercise, in accordance with Article 9³⁶.

Nevertheless, in the case of *Hamidović v. Bosnia and Herzegovina*, the Court held that the restriction on wearing a religious symbol in a courtroom was not proportionate to the legitimate aim of maintaining order, even though the Court acknowledged in that particular case that “the presiding judge of the trial chamber had the difficult task of maintaining order and ensuring the integrity of the proceedings in a case where several participants belonged to a religious group that opposed the concept of a secular state and recognized only the law and the court of God”³⁷. This judgment thus put into perspective the importance that States may attach to a court’s religious neutrality, relative to the individual rights of litigants. The pursuit of an objective of neutrality must be duly justified by being directly linked to a legitimate aim cited in Article 9 § 2, and any restriction pursuing such an objective must then be subject to a proportionality test.

6. Respect for the freedom of belief of litigants, including their right to adhere to the principle of state secularism

6.1. Commitment to the secular nature of the State as a belief

The list of beliefs that the Court has protected under Article 9 includes atheism, but also a commitment to secularism³⁸. Indeed, in the case of *Lautsi v. Italy*, the Grand Chamber held that advocates of secularism are able to assert views that meet the “degree of cogency, seriousness, cohesion, and importance” required for them to constitute ‘convictions’ within the meaning of Article 9 of the Convention and Article 2 of Protocol No. 1³⁹. This recognition by the Grand Chamber confirms that secularism is a “view,” a “philosophical conviction,” on the same footing as other convictions and beliefs deserving of respect, and that it does not constitute a general principle within the Convention’s framework. In other words, it is not imposed on States—any more than adherence to a religion is—but must be respected as an individual conviction, including by States whose political system is not based on it.

The applicants’ activism in favor of amending the Greek Constitution and secularizing the Greek political system therefore constitutes a belief falling within the scope of their freedom of belief under Article 9.

6.2. Freedom to manifest one’s belief or religion in Greek courts

In its aforementioned third-party submission in the case of *Lautsi v. Italy*, the Greek Government acknowledges that “atheists may feel offended” by the presence of religious symbols and that “the perception of the meaning of symbols is indeed highly subjective.” Nevertheless, it explains that the

³⁵ *Hamidović v. Bosnia and Herzegovina*, No. 57792/15, Dec. 5, 2017, para. 35.

³⁶ See also on this subject: *Ahmet Arslan and Others v. Turkey*, No. 41135/98, Feb. 23, 2010, para. 43.

³⁷ *Hamidović v. Bosnia and Herzegovina* No. 57792/15, Dec. 5, 2017, para. 39.

³⁸ *Lautsi and Others v. Italy* [GC], supra, para. 58.

³⁹ *Ibid.* The Grand Chamber refers to the following judgment: *Campbell and Cosans v. the United Kingdom*, Nos. 7511/76 and 7743/76, Feb. 25, 1982, para. 36.

presence of such symbols does not infringe upon their freedom of belief, insofar as “the presence of a symbol does not oblige the student [in the educational context of the present case] to follow a particular religion, nor to look at it, nor to attach any importance to it.”

In the same case, the Grand Chamber adopted a similar line of reasoning. Thus, in the aforementioned passage (§ 74, 4.2. above), it confirmed that the presence of religious symbols had not infringed upon the freedom of belief of the students and their parents.

In applying this reasoning to the courts, the task is to verify that the presence of icons is not associated with proselytizing or systematic favoritism toward the Orthodox religion, that access to the court is open to other minority religions or beliefs, that judgments are not biased by this presence, and, where applicable, that the freedom to manifest a belief or religion in court is protected without discrimination. On this last point, the Court has already noted that Greece does not prohibit the expression of one’s religion or belief in a courtroom through the wearing of a symbol, without giving preferential treatment to the Orthodox religion⁴⁰.

7. National Margin of Appreciation

7.1. The Subsidiary Nature of the Convention Mechanism

In the context of the Convention, the principle of subsidiarity means that “the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States, rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task”⁴¹. The ECHR’s principle of subsidiarity thus establishes a mechanism based on complementarity between national authorities and the European court, rather than on a competition of jurisdictions, as in the EU system. In the case of *Lautsi v. Italy*, the Second Section erred by failing to respect the national “margin of appreciation,” which is one of the main practical applications of the principle of subsidiarity. The margin of appreciation, which defines “relations between domestic authorities and the Court”⁴², allows the Court to move from the general to the specific. This concept is based on the simple fact that being in “direct and continuous contact with the vital forces of their countries, the domestic authorities are better placed than an international court to assess the multitude of factors surrounding each case”⁴³. The exercise of the margin of appreciation must enable the Court to respect the discretion of national authorities and to apply the same law in a flexible manner to a wide variety of situations.

7.2. The sovereign choice to perpetuate a tradition

The issue of historical and cultural heritage was the subject of particularly intense debate in the case of *Lautsi v. Italy*. While the Second Section of the ECHR had failed to examine the case from the perspective of national margin of appreciation⁴⁴, the Grand Chamber, on the contrary, held that Italy could legitimately “confer on the country’s majority religion preponderant visibility in the school environment”⁴⁵. The Grand Chamber’s reasoning emphasized the significance of the Italian government’s decision to uphold a tradition:

⁴⁰ *Hamidović v. Bosnia and Herzegovina*, supra, § 21.

⁴¹ ECHR, Note by the Legal Adviser, *Follow-up to Interlaken – Principle of Subsidiarity*, Document No. 3158598, July 8, 2010.

⁴² *A. and Others v. the United Kingdom* [GC], No. 3455/05, Feb. 19, 2009, para. 184.

⁴³ ECHR, Note by the Legal Adviser, supra.

⁴⁴ *Lautsi and Others v. Italy* [Second Section], No. 30814/06, Nov. 3, 2009.

⁴⁵ *Lautsi and Others v. Italy* [GC], supra, § 71.

67. *The Government, for their part, explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.*

68. *The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development [...]*

8. The Need to Avoid a Second “*Lautsi* Case”

8.1. *Lautsi v. Italy* [Second Section]: Opposition from 22 Member States

The debate over the presence of religious symbols in public institutions has already taken place before the Court in the case of *Lautsi v. Italy*. Contrary to its usual practice, the Court was unable to morally enforce the Chamber’s decision. European states formed an “alliance against secularism”⁴⁶, supporting Italy in its move to refer the case to the Grand Chamber. Ten countries intervened in the *Lautsi* case as third parties⁴⁷. Eight of them were also authorized to intervene collectively at the hearing on June 30, 2010. In addition to these ten countries, eleven others⁴⁸ publicly challenged the Chamber’s judgment and called for respect for national religious identities and traditions. Several governments reiterated that this religious identity is the foundation of European values and unity. Lithuania, for example, drew a parallel between the Chamber’s *Lautsi* ruling and the anti-religious policy it had endured, which manifested itself notably in the banning of religious symbols.

Thus, together with Italy, nearly half of the Council of Europe’s member states (22 out of 47) publicly opposed this logic of secularization. In fact, beyond cultural and legal arguments, these states demonstrated a political recognition of religion and affirmed the social legitimacy of Christianity in European society.

In particular, the states highlighted the consequences of ordering Italy to remove religious symbols on the grounds that their mere presence would violate freedom of belief and the state’s impartiality. If the Court had upheld such a ruling, it would have been necessary to compel the states to remove every remnant of their history linked to a belief, whether in the names of cities, villages, and streets; the selection of public holidays or school vacation dates; or the design of certain flags, including the European flag, etc. Even secular states would have been affected, as France, for example, has numerous symbols reflecting anti-religious beliefs—philosophical and Masonic—in its public, political, and judicial institutions.

8.2. *Lautsi v. Italy* [Grand Chamber]: A Judgment Respectful of Sovereignty

Following the referral of the case, the Chamber’s reasoning—right down to its underlying assumptions—was completely overturned by the Grand Chamber’s final judgment, which held, by a vote of 15 to 2, that there had been no violation of the Convention. This reversal of case law is in accordance with the requirements of a strict interpretation of the Convention. It ultimately appears

⁴⁶ PUPPINCK, Grégor, “An Alliance Against Secularism,” *Osservatore Romano*, Rome, July 27, 2010.

⁴⁷ Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation, and San Marino.

⁴⁸ Albania, Austria, Croatia, Hungary, Macedonia (FYROM), Moldova, Norway, Poland, Serbia, Slovakia, Ukraine.

that the Chamber's judgment was fundamentally political, and that the political reaction it provoked served to bring the Court back onto the objective and realistic path of the law.

A further reversal of case law in this particular case would give the impression of arbitrariness and instability and would once again provoke legitimate opposition from States seeking to defend their traditions.