**PROPOSED WRITTEN COMMENTS**

**EUROPEAN COURT OF HUMAN RIGHTS**
**GRAND CHAMBER**

# CASE OF SOILE LAUTSI v. ITALY

**(*Application no. 30814/06*)**

## COMMENTS OF THIRD-PARTY INTERVENOR

## COALITION OF PROFESSORS OF LAW

## I. Introduction

1. These written comments are submitted by the Coalition of Professors of Law, in accordance with leave granted by the Court under Rule 44 § 2 of the Rules of the Court. Members of the Coalition of Professors of Law are listed in the Appendix to these comments. As set forth in their request for leave to intervene, the Coalition submits these comments in order to assist the Court in reaching a just and equitable result and in properly interpreting the Contracting Parties' obligations set forth in the Convention.

2. The Coalition includes recognised legal scholars from many different Council of Europe states, some of whom are former judges. As a group, the Coalition reflects expertise in constitutional law, European law, human rights, and church-state law. As professors of law and experts in their respective fields, the members of the Coalition have a profound interest in the outcome of this case because the issues involved go to the very core of the Convention and European law generally.

3. The Second Section's judgment in this case rested on three fundamental errors.

4. First, the Second Section's judgment misinterprets Article 9. Freedom of religion does not require the Government to remove from its buildings all symbols or statements that parents or students might find religiously offensive. The true touchstone of an Article 9 claim of this sort is not mere *offense*, but *coercion*. Thus, the Government violates Article 9 not when it displays a symbol that an applicant finds offensive, but when it legally restricts an individual's freedom to believe or manifest that belief.

5. Second, the Second Section's judgment misunderstands the pluralism and dialogue protected by Article 2 of Protocol No. 1. Pluralism is weakened, not strengthened, by banning the display of a symbol that indisputably bears many layers of historical, cultural, and religious meaning. Similarly, dialogue is impoverished when the Government is forbidden from recognising those layers of meaning. And by allowing applicants to challenge any symbol they find offensive on religious or philosophical grounds, the Second Section's judgment invites a wave of applications to this Court by anyone who has any reason to disagree with government curricular decisions.

6. Third, the Second Section's judgment accords no meaningful margin of appreciation to the Contracting Parties, undermining the Convention as a whole and imposing an untenable uniformity on the practices of the Contracting Parties. Not only does the Second Section's judgment attempt the impossible task of excising religion from European culture and history. It also pits the Contracting Parties against their own citizens by erecting a *cordon sanitaire* around all those ideas and symbols that have, within context, some religious meaning. Even were the crucifix an exclusively religious symbol—and it is

not—its passive presence in the classroom is not the end of an argument, but an invitation to dialogue. The Court should not silence the government, or that dialogue.

## II. Discussion

### A. Article 9 protects against coercion, not offense.

7. The Second Section's judgment erroneously conflates Government coercion—against which Article 9 protects—with an applicant's mere offense at a passive symbol. *Lautsi*, § 57 (referring to the "compulsory display of a symbol"). Had the Government coerced applicant M. Lautsi's children—by means of force or through denial of a benefit—to venerate a crucifix or violate their own religious beliefs, this would be a different case, and the Coalition would argue that Article 9 had been violated.

8. But this case does not involve coercion. Coercion exists when the Government forces an individual to engage in some action (or refrain from action) in violation of her religious beliefs, either by force, or by conditioning a benefit on engaging in the activity. For example, in *Buscarini and Others v. San Marino* [GC], no. 24645/94, 1999-I, the Court held that conditioning elective office on renunciation of one's beliefs violated Article 9. *Id.*, § 37. Similarly, in *Supreme Holy Council of the Muslim Community v. Bulgaria*, no. 39023/97 16 December 2004, the Court held that "State measures … seeking to *compel* the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion. *Supreme Holy Council*, § 96 (citing *Serif v. Greece*, no. 38178/97, §§ 49, 52 and 53, ECHR 1999-IX, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI) (emphasis added).

9. This emphasis on coercion, rather than mere offense, is mirrored elsewhere in human rights law. For example, Article 18(2) of the International Covenant on Civil and Political Rights protects against coercion: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." G.A. Res. 2200A, at 21, U.N. GAOR, 1496th plen. Mtg., U.N. Doc. A/RES/2200 (XXI) (16 December 1966) ("ICCPR").

10. Governments also violate Article 9 when they interfere with an individual's ability to follow her conscience or manifest her religious beliefs. Religious freedom necessarily includes the "freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares." *Leela Förderkreis E.V. and Others v. Germany*, no. 58911/00, § 80, 6 November 2008. And manifestation of one's religion or belief takes many forms, including at a minimum "worship, teaching, practice and observance." *Leela Förderkreis*, § 80.

11. By contrast, the passive display of a non-verbal symbol—even a symbol that an individual finds objectionable—does not compel that individual to do any-

thing. The passive display does not require the individual to engage in some activity in exchange for a benefit. The passive display does not inhibit the individual from following her conscience. Nor does the passive display make it impossible for that individual to manifest her own beliefs or ideas, even in opposition to the symbol itself. Indeed, although the Second Section referred to the "compulsory display of a symbol" the only compulsion is that of one level of government (the Italian government) compelling another level of government (individual schools) to display the crucifix. Pupils are not compelled to do anything at all.

12. The Second Section tried to compensate for the absence of coercion by recognising a new right for an individual "not to notice" a symbol she finds "emotionally disturbing." *Lautsi*, § 54, 55. This purported right not to be offended focuses not on how the Government has interfered with the applicant's ability to express her religious beliefs, but on whether the *applicant* may interfere with the *Government's* ability to speak.

13. If it were adopted by the Grand Chamber, the right not to be offended would quickly lead to absurd results, because individuals take religious offense to many symbols. For example, Jehovah's Witnesses typically believe that the flag of a country is a "graven image" that may not be honored. *See West Virginia Board of Education v. Barnette*, 319 U.S. 624, 629 (United States Supreme Court 1943). Would a student with similar beliefs be allowed to force the government to take down a national flag displayed within a school building? Can a Muslim student who believes the Cross of St. George is a blasphmous symbol of the Crusades ask to have it removed from English classrooms? Could a Calvinist student ask a school to take down a picture honoring a Catholic religious figure? The Second Section's judgment raises these questions but does not answer them.

14. Nor is the Second Section's reasoning limited to symbols. A Muslim student might believe that the way the Prophet Muhammad is described in a schoolbook is blasphemous. Could he force the government not to refer to the Prophet Muhammad at all? An English Protestant student might be offended by a history curriculum that takes a critical attitude towards Oliver Cromwell's treatment of the Irish. Could he force the government to remove the criticism from the curriculum?

15. Likewise there would be no reason to restrict the right not to be offended to the classroom. A traditionalist Catholic might be offended by the statue of Jan Hus in Prague's Old Town Square. A Jewish citizen might take religious offense at a government minister's criticism of Israel. A Hindu might take religious offense at what he views as the sacrilegious display of religious art in a government-owned museum. Would the claims of these citizens be admissible under Article 9? The Second Section's invention of a right not to be offended opens a Pandora's box that will not be easily shut.

16. The Court should therefore focus on what the Government has done, and whether the Government's action forcibly interferes with the applicant's Article 9 rights. Unless it wishes to give every citizen in the Council of Europe a religious veto on government displays, the Court should reject the idea of the right not to be offended.

17. *Folgerø and Others v. Norway*, [GC], no. 15472/02, 29 June 2007, which involved mandatory religion classes, does not require a different result. There, the government's conduct was coercive: it forced every student to engage in activities mandated by the challenged curriculum. *Folgerø*, § 25. Here, no student is being compelled to do anything. Moreover, although in *Folgerø* there was a partial opt-out from participating in the curriculum, it was neither complete nor easily obtainable. *Folgerø*, § 25. Here, there is no duty to participate in any activity related to the crucifix; indeed, there is no claim that there are any crucifix-related activities at all. Third, the government expression at issue in *Folgerø* was made up of a wide variety of texts. *Folgerø*, § 15. The government's meaning and intent are clearer when the communication involves active engagement with texts, rather than the passive display of a non-verbal symbol.

18. This case bears a much stronger relationship to this Court's judgments under Article 10. In those cases, the government is not justified in silencing one citizen's speech merely because another citizen finds the speech to be offensive.[1] As the Grand Chamber put it last year, "freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'" *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, no. 32772/02, § 96, 30 June 2009 (citing *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24 and other cases). If one individual cannot silence another merely because he is offended, why should the same offense entitle an individual to silence the Government? The two lines of cases are not easily reconciled.

**B. Article 2 of Protocol No. 1 does not limit passive displays of non-verbal symbols like a crucifix or national flag.**

19. Article 2 of Protocol No. 1 cannot fairly be read to limit the Government's ability to display non-verbal symbols. First, government speech like the passive display at issue here does not inhibit pluralism and dialogue, it promotes it. Second, the passive display of a non-verbal symbol is not a curricular ele-

[1] Only a small subset of offensive speech is also speech that incites hatred or imminent violence. Although inciting one group of people to attack another is without exception offensive, offensive or provocative speech is not always incitement.

ment that can be evaluated as "objective" or "critical," not least because it lacks any univocal message. Third, applying Article 2 of Protocol No. 1 in this context would lead to absurd results.

**1. Applying Article 2 of Protocol No. 1 to limit passive displays of the crucifix would *decrease* pluralism and dialogue.**

20. Article 2 of Protocol No. 1 requires that governments "take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner." *Kjeldsen, Busk, Madsen and Pedersen v. Denmark*, 7 December 1976, § 53, Series A no. 23. Measured by this standard, silencing the government's speech here would make the curriculum *less* pluralistic, not more. To the extent that the crucifix could be viewed as part of the curriculum—and in the Italian context it is not—its role would be to spur discussion and dialogue. The crucifix is a symbol which might convey a variety of meanings. It may convey overlapping and sometimes even contradictory historical, cultural, and religious meanings, all of which are dependent upon both its context and the predispositions of those who view it. Thus, the crucifix is ideally situated as a starting point for dialogue.

21. The Second Section's analysis is oblivious to this fact. Instead, it treats the presence of the crucifix as somehow inhibiting dialogue. Without relying on any evidence before it even purporting to show that children with minority religious beliefs are struck dumb in the presence of a crucifix, the Second Section engaged in a sort of psychoanalysis of the religious minority students. For example, it stated that for religious minority students seeing a crucifix "may be emotionally disturbing." *Lautsi*, § 55. Upon this admitted guess about the psychological state of minority religious students in the aggregate, the Second Section decided that the crucifix was anti-pluralistic and must be removed.

22. Yet the Court has recognised on other occasions that restricting speech inhibits, rather than promotes, pluralism. In the *Supreme Holy Council* case, for example, the Court observed that the Government could not silence one of two contending parties because it would eliminate dialogue, which is necessary to pluralism: "What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome." *Supreme Holy Council*, § 93 (citing *Kokkinakis v. Greece*, 25 May 1993, § 33, Series A no. 260-A, *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 123 ECHR 2001-XII, and *Hasan and Chaush*, § 78).

23. The right way to address differences of opinion in a truly *pluralistic* society is to allow for more speech, not less. True pluralism involves confrontation with ideas with which one may disagree. Dialogue is only possible where there is some difference of opinion. The alternative is a deadening "conformism or uniformity of thought" that the Court should seek to avoid. *İ.A. v. Turkey*, no.

42571/98, § 8, ECHR 2005-VIII, joint dissenting opinion of Judges Costa, Cabral Barreto, and Jungwiert.

24. Nor is there any reason that expression connected to the majority religion should be singled out as anti-pluralistic or particularly disfavored, as the Second Section did in its judgment here. *Lautsi*, §§ 50, 54. For example, in *Zengin v. Turkey*, no. 1448/04, ECHR 2007-XI, the Court expressly rejected the idea that a religion could be disfavored solely because a majority of the Government's citizens adhere to the religion. It was of no moment that the Turkish curriculum "give[s] greater priority to knowledge of Islam than [it] do[es] to that of other religions and philosophies." "In the Court's view, this itself cannot be viewed as a departure from the principles of pluralism and objectivity which would amount to indoctrination, having regard to the fact that, notwithstanding the Government's secular nature, Islam is the majority religion practiced in Turkey." *Zengin*, § 63 (citing *Folgerø*, § 89). Real pluralism includes both majority and minority viewpoints. Suppressing any viewpoint limits pluralism.

**2. Passive displays of non-verbal symbols cannot be evaluated as objective or critical elements of curriculum.**

25. As noted above, Article 2 of Protocol No. 1 requires that knowledge and information in the curriculum must be conveyed objectively and critically. It is difficult to go about applying this rule to the crucifix, since the crucifix is not part of the curriculum in Italian state schools. *See* Article 1(1) of Legislative Decree (*decreto legislativo*) no. 297 of 16 April 1994, (guaranteeing to Italian teachers the freedom of teaching and free cultural expression). Nor is it clear exactly what the "meaning" of the crucifix is, since it is a symbol that can signify several different meanings at once. Without text to interpret, or any evidence of whether the crucifix is ever actually referred to during instructional time, the crucifix cannot be said to have a single, government-approved message that can be tested for objectivity and criticality.

26. Nor is it true that religious ideas are *per se* incapable of being conveyed objectively and critically. Indeed, the Court made clear in *Folgerø* that religious ideas can be taught objectively and critically. *Folgerø*, § 37. Were it not so, every religion curriculum within the Council of Europe might be invalid.

**3. Applying Article 2 of Protocol No. 1 to the passive display of a symbol would invite all manner of religious and philosophical grievances.**

27. It does not take much imagination to think of situations where this new-found right would result in at least as many absurd applications to the Court as under Article 9. First, because Article 2 of Protocol No. 1 protects not just parents' religious beliefs, but also their philosophical beliefs, the scope of potential lawsuits is far broader. Moreover, because Article 2 of Protocol No. 1 is read in conjunction not only with Article 9, but also Articles 8 and 10, it could also apply to simple political disagreements. *Kjeldsen*, §52.

28. For example, could an anti-Kemalist parent demand that all the pictures of Atatürk in his son's school be taken down? Could a pro-Communist parent in Russia object to how the history of the Soviet Union is taught? Could atheists object to the display of national flags and coats of arms on the basis that many contain symbols that are religious in nature? Under this logic, there is no limit to the number nor type of government displays that might be subject to challenge.

## C. The Court should recognise that governments enjoy a substantial margin of appreciation when they make references to religion in public life.

29. The third and perhaps most important reason the Court should reject the Second Section's judgment is because that judgment creates an unnecessary conflict between government and religion where the two can and should be complementary. By fomenting rather than resolving such a conflict, the Second Section's judgment has called into question the Court's own institutional role. The Court can reclaim its proper role by recognising, as it has in so many other contexts, that under the Convention Contracting Parties have an ample margin of appreciation, in this case large enough to engage in government speech that includes religious symbols.

### 1. The margin of appreciation a Contracting Party possesses depends on the cultural and historical context in which the claimed right is situated.

30. The Court has recognised that the margin of appreciation Contracting Parties enjoy is contingent on the cultural and historical contexts in which the right claimed by the applicant is situated. Thus in the context of a challenge to an electoral system, the Court has said that:

> There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision.

*Ždanoka v. Latvia*, [GC], no. 58278/00, § 103, ECHR 2006-IV (citation omitted). In another context, the Court has held that the margin of appreciation a Contracting Party has varies depending on (1) how strongly the practice involved is embedded in the culture; and (2) whether there is any convergence between the rules adopted by different Contracting Parties:

> [Naming rules are] a domain in which national particularities are the strongest and in which there are virtually no points of convergence between the internal rules of the Contracting States. This domain reflects the great diversity between the member States of the Council of Europe. In each of these countries, the use of names is influenced by a multitude of factors of an historical, linguistic, religious and cultural nature, so that is extremely difficult, if not impossible, to find a common denominator. Consequently, the margin of appreciation which the State authorities enjoy in this sphere is particularly wide.

*Mentzen alias Mencena v. Latvia* (dec.), no. 71074/01, ECHR 2004-XII (citation omitted). "Likewise, the fact that a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field which is so closely bound up with the cultural and historical traditions of each society." *Mentzen*, cited above (citation omitted).

31. Both of these principles applied to the display of religious symbols in public life indicate a very wide margin of appreciation. First, it is undisputed that the Italian practice of displaying crucifixes on the walls of classrooms is "closely bound up with the cultural and historical traditions of [Italian] society." The public reaction to the Second Section's judgment, of which no one can be unaware, is one indicator that the crucifix on the classroom wall is widely viewed as an important part of the Italian cultural and historical tradition.

32. Second, this is an area where there is almost no "common denominator" among the Contracting Parties. Some states, such as France or Belgium, have a tradition of official laïcité. Other states, such as the United Kingdom or Greece have an established or officially prevailing religion. In yet other states, such as Germany, practices vary from region to region—in Bavaria there are crucifixes on classroom walls, but in Berlin there are not. Without any cognisable common denominator, and in the absence of coercion, it is clear that Contracting Parties must enjoy the widest possible margin of appreciation when it comes to government display of passive religious symbols.

33. Although the issue was argued to the Court, *Lautsi*, §§ 38, 41, the Second Section failed even to mention the margin of appreciation in reaching its decision, much less explain why it did not apply here. The Grand Chamber should correct this error by applying a wide margin of appreciation.

**2. Banning all religious symbols from public life is both impossible and inadvisable.**

34. A wide margin of appreciation it not just required by the terms of the Convention; it is also dictated by prudence. The Second Section's judgment, by contrast, sets government and religion on an entirely avoidable collision course.

35. It is an undeniable anthropological truth that individuals and institutions are enculturated. As part of that enculturation, these individuals and institutions are embedded in histories of their own, histories that in Europe *always* include a religious component.

36. Thus dialogue within any pluralistic European society cannot take place without some knowledge of history and tradition, and therefore religion. The Court cannot pretend away the past, nor should it try. As in all of the Council of Europe, religious belief is part of the tradition and history of Italy—whatever the current or future beliefs of Italians—and is thus an irremovable part of

Italian culture. It would therefore be impossible for government officials to attempt to extract all of the arguably religious symbols out of public life.

37. Other government displays confirm this idea. Religious symbols are an element of innumerable governmental displays ubiquitous within the territories of the Contracting Parties. For example, the national flags of 18 of the 47 members of the Council of Europe contain religious symbols: Andorra, Azerbaijan, Denmark, Finland, Georgia, Greece, Iceland, Liechtenstein, Malta, Moldova, Norway, Serbia, Slovakia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Regional and civic flags also contain religious symbols.

38. Hundreds of national, regional, and civic coats of arms incorporate religious images or words. For example, the coat of arms of the City of Brussels depicts the Archangel Michael slaying a black devil by piercing it with a cross-shaped spear. Flags and coats of arms that include prominent religious iconography are commonly on display in government buildings.

39. Governments have also put public art incorporating religious symbols on display throughout the Council of Europe. The leading museums of Europe contain hundreds of examples of religious art. Public spaces in European cities are often dominated by religious statuary or architecture. These displays of religiously-themed art could not be subtracted from public spaces without leaving an enormous gap. And in those societies that have attempted to erase religion from the public square—the Soviet Union under Stalin, China under Mao, and Afghanistan under the Taliban—there has later been a revulsion at the iconoclasm and an attempt to restore what had been lost.

40. Indeed, any attempt to exile religious symbols and ideas from the public square would be foolhardy, because religious symbols and religious ideas are an integral part of the tapestry of European civilisation. Pull out that thread, and the entire tapestry unravels.

**3. In describing the margin of appreciation governments have to display religious symbols, the Court should seek to maximise, not silence, dialogue about religion.**

41. The Court should also interpret the margin of appreciation governments enjoy in displaying religious symbols so as to increase dialogue about religion, and thus pluralism. The Second Section made several assumptions that undermine that rule of interpretation.

42. One of the unstated premises supporting much of the Second Section's judgment is that there is something unseemly about inter-religious dialogue, or debate between the secular and the religious. Yet religious pluralism and religious debate are fundamental parts of the human experience and therefore belong in the classroom. The United Nations has long espoused this view:

> Schools can be a suitable place for learning about peace, understanding and tolerance among individuals, groups and nations in order to develop respect for pluralism. In addition, interreligious and intra-religious dialogue is vital for the prevention of conflicts. … Teachers, children and students could benefit from voluntary opportunities for meetings and exchanges with their counterparts of different religions or beliefs, either in their home country or abroad.

Asma Jahangir, *Interim report of the Special Rapporteur on freedom of religion or belief*, ¶ 31, *delivered to the General Assembly*, U.N. Doc. A/62/280 (20 Aug. 2007). This dialogue—among Christian, Muslim, and Jew, among majority and minority, and among the religious and the irreligious—is thus essential to a pluralistic society. Attempting to silence that dialogue by "privatising" religion is ultimately dangerous for societies, because younger people lose the vocabulary to talk about faith and religious differences. The relative religious peace Europe now enjoys is imperiled when younger people know only a vocabulary of violence in which to express their differences.

43. Another unfounded premise of the Second Section's judgment is its claim that it is merely enforcing neutrality. This claim betrays a fundamental misunderstanding of what neutrality means in this context. Neutrality is not achieved by removing religion from public debate, because the very act of removal sends a message of hostility towards religious belief. Governments (and the Court) are not writing on a blank slate, or acting in a world where individuals are ignorant of the history that has gone before. An empty wall in an Italian classroom is no more neutral—indeed, it is far less so—than is a wall with a crucifix upon it. In fact, because the empty wall cannot escape the rich context of Italian tradition and history, it sends a loud message—an official rebuke to those who believe that religion has a place in public dialogue.

44. In fact, neutrality is best achieved not by suppressing speech, but through open dialogue about religion and religious symbols of many different faiths. Pretending that removing religious symbols creates an even playing field is the easy way out of a necessary dialogue between religious majority and religious minority, religious and irreligious. And that lack of dialogue is in fact dangerous to the body politic.

45. The question before the Court is thus not whether a dialogue between religion and secularism will happen, but on what terms. Will religious belief and tradition be pushed to the margins of public discourse, quarantined by a *cordon sanitaire*? Or will religions be allowed to enter into dialogue both with the secularist worldview and with one another, all in an attitude of mutual respect?

## III. Conclusion

46. For the reasons stated above, the Grand Chamber should hold that there has been no violation of the Convention.

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