

THE “MARGIN OF APPRECIATION” AND FREEDOM OF RELIGION: BETWEEN TREATY INTERPRETATION AND SUBSIDIARITY

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INTRODUCTION

In its recent decision in *Lautsi v. Italy*, the Grand Chamber of the European Court of Human Rights recognized that Italy enjoys a wide “margin of appreciation” in questions relating to public displays of religious symbols.¹ While this recognition appears in line with the European court’s case law, it was a radical departure from the approach taken by the Chamber in its 2009 judgment in the *Lautsi* case and has attracted extensive criticism. It appears worthwhile, therefore, to review the Grand Chamber’s recognition of the “margin of appreciation” in *Lautsi* and, in particular, to scrutinize the Grand Chamber’s legal analysis. After briefly elaborating on the “margin of appreciation” concept in the system of the European Convention on Human Rights, this Article argues that the international rules on treaty interpretation and the principle of subsidiarity provide the Grand Chamber’s use of the concept with a solid legal basis. The relevance of both standards can hardly be questioned: Rules on treaty interpretation are at the root of the task of the European Court when it is called upon “[t]o ensure the observance of the engagements undertaken by the High

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¹ See No. 30814/06, ¶ 70 (Eur. Ct. H.R. Mar. 18, 2011) [hereinafter *Lautsi II*], available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>. *Lautsi* was decided by a Chamber of the European Court of Human Rights on November 3, 2009, see *id.* ¶ 30, and then by the Grand Chamber of the same court in its judgment on March 18, 2011, which reversed the lower court’s decision, see *id.* at 31.

Contracting Parties in the Convention and the Protocols thereto,”² and subsidiarity is one of the basic features of the European Convention on Human Rights.

II. THE “DOCTRINE” OF THE “MARGIN OF APPRECIATION”

Usually referred to as a “doctrine,” the “margin of appreciation” refers to an area of state discretion recognized by the European Court of Human Rights (“European Court”) in the implementation of certain rules of the European Convention on Human Rights (“European Convention”).³ The margin applies, in varying degrees, with respect to the European Convention’s rules on non-absolute rights and freedoms and with respect to the derogation clause in Article 15.⁴ These rules have two main

² See Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention on Human Rights], available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

³ See YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 1–2 (2002); R. St. J. MacDonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 95, 103 (1992); see also GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 58 (2007); Rosario Sapienza, *Sul margine d’apprezzamento statale nel sistema della Convenzione europea dei diritti dell’uomo* [On the Margin of Appreciation in the State System of the European Convention on Human Rights], 74 RIVISTA DI DIRITTO INTERNAZIONALE 571, 571 (1991) (It.); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 843 (1999); Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, 3 UCL HUM. RTS. REV. 1, 2 (2010), available at <http://www.ucl.ac.uk/human-rights/ucl-hrr/docs/hrreviewissue3/greer>.

⁴ According to the first paragraph of Article 15:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Convention on Human Rights, *supra* note 2, at art. 15. Paragraphs two and three further limit the right to derogate from the Convention, by establishing that the right to life—except for deaths resulting from lawful acts of war—under Article 2; the prohibition of torture and inhuman or degrading treatment or punishment under Article 3; the prohibition of slavery or servitude under Article 4, Paragraph 1; and the *nulla poena sine lege*—no penalty without law—principle under Article 7 are not derogable under any circumstance, and that states availing themselves of the right to derogate have to inform the Secretary General of the Council of Europe of the measures taken, their reasons, and their cessation. See Convention on Human Rights, *supra* note 2, at art. 15; see also *The System of Restrictions*, in PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN*

common elements. First, they are said to be "open-ended or unsettled . . . provid[ing] limited conduct-guidance"⁵ and allowing a plurality of modes of implementation, all possibly compatible with the European Convention. Second, they permit restrictions under specified conditions that depend on the determination of national authorities, such as the existence of a public emergency threatening the life of the nation, or a legitimate public policy reason, including the protection of the rights of others, public health, or public order. For example, in one of its most recent statements on this topic, concerning the right to vote, the Grand Chamber said: "[T]he rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and the Contracting States must be afforded a margin of appreciation in this sphere."⁶

Many rights and freedoms protected by the European Convention implicate important social and economic policies of member states, and the European Convention's institutions in Strasbourg have consistently recognized the "margin of appreciation" of contracting parties with respect to such policies. This recognition is so for a few reasons. First, national democratic authorities, who are closer to local conditions, are better positioned than international judges to devise public policy in these fields.⁷ Second, because local conditions differ from one Contracting State to another, a contextual approach is needed: "The scope of the margin of appreciation will vary according to

RIGHTS 333, 333–50 (Pieter van Dijk et al. eds., 4th ed. 2006) (discussing limitation clauses under the European Convention).

⁵ Yuval Shany, *Toward a General Margin of Appreciation in International Law?*, 16 EUR. J. INT'L L. 907, 910 (2006); Rosario Sapienza, *L'interpretazione della Convenzione europea tra margine di apprezzamento statale e vincolo di interpretazione conforme. Profili sistematici*, in LA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO E IL GIUDICE ITALIANO 171 (Francesco Salerno & Rosario Sapienza eds., 2011).

⁶ *Scoppola v. Italy* (No. 3), No. 126/05, ¶ 83 (Eur. Ct. H.R. May 22, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044>. As one commentator aptly observes, in such cases "[f]or the Court to substitute its own conception of what is appropriate may, therefore, result in it taking sides in national debates concerning the resolution of genuine human rights and public interest dilemmas which are not amenable to any straightforward legal solution." Greer, *supra* note 3, at 3–4.

⁷ ARAI-TAKAHASHI, *supra* note 3, at 214 (providing references to relevant case law).

the circumstances, the subject-matter and its background.”⁸ Third, historical and cultural variations must be taken into account. Recently, for example, the Grand Chamber said, “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.”⁹

With regard to the freedom of religion and its intersection with the right to education—the issues in *Lautsi*—the European court’s recognition of the “margin of appreciation” has taken on a rather coherent pattern, revolving around some basic ideas: Religion and education are delicate and complex areas of state authority, where there is no common European approach;¹⁰ states enjoy a margin of appreciation with respect to education policy and their relations with religion;¹¹ it is for national authorities to organize, regulate, and restrict the rights and freedoms involved according to their views as they have historically developed;¹² and review of Contracting States’ actions must take into account specific local conditions.¹³

Nevertheless, the discretion conferred on Contracting States is not unlimited. The court has emphasized that Contracting States are not relieved of their obligations under the European Convention, and that European supervision is necessary to establish whether Contracting States have overstepped their legitimate discretion.¹⁴ Proportionality also plays a role in such assessments: The court must be satisfied that the discretion exercised by the Contracting State does not restrict protected rights beyond what is strictly necessary in the special

⁸ *Rasmussen v. Denmark*, No. 8777/79, ¶ 40 (Eur. Ct. H.R. Nov. 28, 1984), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57563>.

⁹ *Hirst v. United Kingdom (No. 2)*, No. 74025/01, ¶ 61 (Eur. Ct. H.R. Oct. 6, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70442>.

¹⁰ See *Lautsi v. Italy*, No. 30814/06, ¶ 68, at 27–28 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

¹¹ *Id.* ¶¶ 68–69.

¹² See *Dogru v. France*, No. 27058/05, ¶ 72, 19–20 (Eur. Ct. H.R. Dec. 4, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039>.

¹³ *Lautsi II*, No. 30814/06, ¶¶ 61, 68, 69.

¹⁴ *Id.* ¶ 68.

circumstances contemplated by the limitation clauses, or amount to undue interference with the rights guaranteed by the European Convention.¹⁵

The “margin of appreciation” doctrine has been controversial. Critics have argued that the doctrine represents the European court’s attempt to show respect for Contracting States’ sovereignty to maintain their consent. In other words, the doctrine represents an objectionable deference by the court to national authorities. Similarly, critics argue, the doctrine is hardly compatible with human rights and the underlying aspiration to a universal standard for their protection, since it allows for preferential treatment of the state and majorities to the detriment of the protection of the individual and minorities.¹⁶ Conversely, according to more favorable opinions, the “margin of appreciation” is “an essential constitutional device designed to preserve the fundamental prerequisite and virtue of a liberal democratic society: value pluralism”; and also a necessary tool for the accommodation of individual rights and collective goals.¹⁷ Supporters emphasize, however, the necessity of a principled approach to the “margin of appreciation.”

As will be argued below, this second view appears more convincing. The “margin of appreciation” is inherent in international human rights obligations and in their enforcement in two respects: under the rules on treaty interpretation and due to the subsidiary character of international human rights law and its enforcement mechanisms.

¹⁵ See ARAI-TAKAHASHI, *supra* note 3, at 14, 190; see also *id.* at 99 (discussing specifically freedom of religion). The Grand Chamber does not refer explicitly to proportionality in the *Lautsi* case because it does not approach the display of the crucifix in the classroom as a restriction on protected rights. See *Lautsi II*, No. 30814/06, at 31. However, in his concurring opinion, Judge Rozakis states that the main issue in this case is the following:

Proportionality between, on the one hand, the right of parents to ensure their children’s education and teaching in conformity with their own religious and philosophical convictions, and, on the other hand, the right or interest of at least a very large segment of society to display religious symbols as a manifestation of religion or belief.

Id. at 34. The concurring opinion of Judge Bonello also addresses proportionality. *Id.* at 42.

¹⁶ See Benvenisti, *supra* note 3, at 844, 849 (providing additional references to the incompatibility of the “margin of appreciation” with universal human rights).

¹⁷ ARAI-TAKAHASHI, *supra* note 3, at 249.

III. THE “MARGIN OF APPRECIATION” IN *LAUTSI V. ITALY*

In *Lautsi v. Italy*, the “margin of appreciation” doctrine was totally neglected by the Chamber, which unanimously found a violation by Italy of Article 2 of Protocol No. 1, in conjunction with Article 9.¹⁸ The doctrine figured prominently, however, in the Grand Chamber’s decision, overturning the Chamber’s ruling by a vote of fifteen to two.¹⁹

In its November 3, 2009, judgment, the Chamber concluded that by requiring the display of the crucifix in public school classrooms, Italy had violated “the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe.”²⁰ Display of the crucifix, the Chamber reasoned, is incompatible with the state’s duty of neutrality with respect to the exercise of its functions, particularly education. To quote the Chamber:

[T]he compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe [T]he restrictions are incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education.²¹

¹⁸ *Lautsi II*, No. 30814/06, ¶ 4.

¹⁹ *Id.* at 31.

²⁰ *Lautsi v. Italy*, No. 30814/06, ¶ 57 (Eur. Ct. H.R. 13 Nov. 3, 2009) [hereinafter *Lautsi I*], available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95589_rev'd, *Lautsi II*, No. 30814/06.

²¹ *Id.* For a critical analysis and further sources, see generally Monica Lugato, *Simboli Religiosi E Corte Europea Dei Diritti Dell'uomo: Il Caso Del Crocifisso* [Religious Symbols and the European Court of Human Rights: The Case of the Crucifix], 93 RIVISTA DI DIRITTO INTERNAZIONALE 402 (2010); Antonino Spadaro, *La sentenza «Lautsi» sul Crocifisso: summum jus, summa iniuria?* [The «Lautsi» Judgment on the Crucifix: summum jus, summa iniuria?], DIRITTO PUBBLICO COMPARATO ED EUROPEO (2011); J.H.H. Weiler, Editorial, *Lautsi: Crucifix in the Classroom Redux*, 21 EUR. J. INT’L L. 1–6 (2010) (author subsequently plead at the Oral Hearing in front of the Grand Chamber on behalf of the states that intervened in favor of Italy on appeal). For a positive appraisal of the Grand Chamber’s decision, see, for example, Susanna Mancini, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, 6 EUR. CONST. L. REV. 6, 6 (2010). For an in-depth discussion of the case and its wider law and religion implications, see generally CARLO CARDIA, *IDENTITÀ RELIGIOSA E CULTURALE EUROPA: LA QUESTIONE DEL CROCIFISSO* [RELIGIOUS AND CULTURAL IDENTITY OF EUROPE: THE QUESTION OF THE CRUCIFIX] (2010).

It is worth noting that the Chamber refers to the display of the crucifix as a *restriction* of the individual rights to freedom of religion and education in conformity with the parents' convictions. Under the European court's case law, described above, this reference to "restriction" should have triggered an inquiry into conditions that might justify the restriction. Was display of the crucifix "prescribed by law," and "necessary in a democratic society" in the interest of public safety, the protection of public order, health or morals, or for the protection of the rights of others?²² This inquiry is altogether lacking in the Chamber's ruling. Furthermore, in accordance with Strasbourg case law, the Chamber should have examined whether, in "restricting" individual rights, Italy had stayed within its "margin of appreciation," included under proportionality.²³ As we have seen, this is a standard feature in cases concerning freedom of religion and the right to education. No mention was made, however, of the "margin of appreciation," despite the fact that Italy had invoked the doctrine before the Chamber. Italy had argued that in the absence of a European consensus on the notion of state secularity, or *laïcité*, contracting parties had a wider "margin of appreciation" with respect to the implications and practical consequences of that principle.²⁴

As is well known, in its decision on March 18, 2011, the Grand Chamber held that no violations of Article 2 of Protocol No. 1, read in conjunction with either Article 9 or Article 14, had occurred as a consequence of the display of the crucifix in Italian state school classrooms. As far as the "margin of appreciation" goes, the Grand Chamber's position can be summarized as follows: First, contracting parties enjoy a "margin of appreciation" in the implementation of the obligation posed by Article 2 of Protocol No. 1, since its content can vary according to circumstances. Based upon settled case law, Article 2 cannot be interpreted as implying a duty for the state to provide the particular form of teaching desired by the parents.²⁵ Second,

²² ARAI-TAKAHASHI, *supra* note 3, at 9, 11, 62–63; Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 2 (1998).

²³ See *supra* note 15 and accompanying text; see also Sahin v. Turkey, No. 44774/98, ¶ 71 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>.

²⁴ *Lautsi I*, No. 30814/06, ¶ 41.

²⁵ *Lautsi II*, No. 30814/06, ¶ 61.

contracting parties enjoy a “margin of appreciation” when it comes to setting up public school curricula, specifically with regards to religion’s place in school, where policies may legitimately vary: The state is not prevented from providing courses on religion that all pupils must attend, as long as the material is imparted in an objective and critical manner and keeps away from proselytism and indoctrination.²⁶ Third, the “margin of appreciation” extends, in principle, to the organization of the school environment: Article 2 of Protocol No. 1 requires respect for the right to education in conformity with parents’ convictions *in the exercise of all the functions of the State in the field of education*.²⁷ Fourth, 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 Contracting States.²⁸ And finally, the court concludes that it is for the state to reconcile the exercise of its functions in relation to education with the exercise of its obligation to respect the rights of parents.²⁹

Having thus recognized Italy’s “margin of appreciation,” the Grand Chamber stressed, however, that this did not relieve Contracting States of their obligations under the European Convention. In the context of this case, Italy had the obligation to ensure that public schools conveyed knowledge in an impartial, critical, and objective way, and to abstain from proselytism and indoctrination.³⁰ Furthermore, the court emphasized that Italy’s action under the “margin of appreciation” remained subject to European supervision.³¹

²⁶ *Id.* ¶ 62. If the case allows, and given respect for the mentioned conditions, the Contracting State can even grant larger consideration to the religion of the majority. *See, e.g.,* Folgerø v. Norway, No. 15472/02, ¶ 89, at 36–37 (Eur. Ct. H.R. June 29, 2007), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81356>; Appel-Irrgang v. Germany, No. 45216/07, 10–12 (Eur. Ct. H.R. Oct. 6, 2009), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112539> (pronouncing the compatibility with Article 2, Protocol 1, of the decision to establish a general Ethics course for all pupils, the course having been found “neutral” towards religion and the corresponding decision covered under the “margin of appreciation”); Zengin v. Turkey, No. 1448/04, ¶ 63, 17–18 (Eur. Ct. H.R. Sept. 1, 2008), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82580>.

²⁷ *Lautsi II*, No. 30814/06, ¶¶ 63–65, at 26–27.

²⁸ *Id.* ¶ 68, at 27–28.

²⁹ *Id.* ¶ 69.

³⁰ *Id.* ¶ 64, ¶¶ 69–76, at 28–30.

³¹ *Id.* ¶ 70.

Therefore, according to the Grand Chamber, the obligation of the Contracting State to respect parents’ convictions in the exercise of its functions in education requires the state to abstain from proselytism and indoctrination, while ensuring the objective, impartial, critical, and pluralistic conveyance of information and knowledge. Moreover, the obligation to grant religious freedom imposes on a Contracting State the duty to ensure that all persons under its jurisdiction enjoy the right to have or not have, to change, and to manifest religious beliefs, and the duty to abstain from requiring acts of observance of any given religion. Essentially, the Contracting States must ensure “neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups.”³²

According to the Grand Chamber, therefore, the duty not to display religious symbols does not appear to be within the scope of Article 2 of Protocol No. 1 or Article 9. In context, the display of the crucifix does not amount to indoctrination; it does not coerce any behavior.³³ Giving “preponderant visibility” to a particular religion in school curricula or in the school environment is not, in itself, incompatible with the European Convention, nor does it violate the state’s duty of neutrality.³⁴

Both conclusions are rooted in the Grand Chamber’s rather comprehensive evaluation of the context—the Italian one—in which the display of the crucifix occurs: a context of openness to all religions—as demonstrated in curricula, through regulations allowing pupils to wear religious symbols or apparel, and in the recognition of different religious practices for schools’ educative, organizational, and administrative purposes—where no tendency to proselytize has been demonstrated, and where the right of parents to educate their children according to their religious or philosophical convictions appears unrestricted.³⁵

³² *Id.* ¶ 60.

³³ In this case, the court addressed the display of the crucifix as “passive.” *Id.* ¶ 72. *But see*, *Buscarini v. San Marino*, No. 24645/94, ¶¶ 32–41, at 8–10 (Eur. Ct. H.R. Feb. 18, 1999), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58915> (holding that the safeguard of a tradition does not justify the obligation to make an oath on the Bible before taking office in Parliament).

³⁴ *Lautsi II*, No. 30814/06, ¶ 71, at 28–29.

³⁵ On the relevance of social history, providing at least *some* context within which the various clashing values of neutrality and respect can be mediated in

IV. EVALUATION

A. *Margin of Appreciation and the Rules on Treaty Interpretation*

Is the interpretive approach adopted by the Grand Chamber, according to which Contracting States have discretion concerning displays of religious symbols and in which Italy did not overstep the limits of its “margin of appreciation” in its display of the crucifix in state schools, legally sound?

Before answering that question, it is worth emphasizing that the Grand Chamber was not called upon to decide whether display of the crucifix is in itself good, bad, appropriate, or even whether the display was in harmony “with the principle of secularism as enshrined in Italian law,”³⁶ but rather only whether Italy had violated Article 2 of Protocol No. 1 and Article 9 of the European Convention by requiring display of the crucifix in state school classrooms.³⁷ In fact, in its case law, the court has reiterated that it is not for the court to express a view on the appropriateness of the methods chosen by the legislature of a respondent state to regulate a given field. The court’s “task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention.”³⁸ As a supervisory body, the court’s function is to monitor observance of the obligations that the European Convention stipulates, not to create new ones.³⁹

freedom of religion cases, and on its role in the *Lautsi* case, see generally the convincing arguments of MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013).

³⁶ *Lautsi II*, No. 30814/06, ¶ 57.

³⁷ *Id.* As previously noted, this is the starting point for a correct understanding of the judgment, whereas many of its critics seem to depart from the idea that it was for the court to enforce a specific idea of freedom of religion, understood as strict secularism, which would not admit the public display of religious symbols, but which is not endorsed as such by the European Convention. See Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIGION 338, 361 (2012). *Contra* Mancini, *supra* note 21; Lorenzo Zucca, *Lautsi: A Commentary of the Grand Chamber Decision*, 11 INT’L J. CONST. L. 218, 221–22 (2013).

³⁸ See, e.g., *Sahin v. Turkey*, No. 44774/98, ¶ 94 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>.

³⁹ See *Lautsi II*, No. 30814/06, at 36 (Rozakis, J., concurring).

The court's approach has to be evaluated under the international rules concerning treaty interpretation. These rules are codified in the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention") and correspond to general international law, as the International Court of Justice has repeatedly recognized.⁴⁰ It is settled case law of the Strasbourg judges that the rules are applicable to the interpretation of the European Convention, "subject, where appropriate, to 'any relevant rules of the organization'—the Council of Europe—within which it has been adopted (Article 5 of the Vienna Convention)."⁴¹

Article 31, Paragraph 1, of the 1969 Vienna Convention establishes that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," except when it is established that the parties intended a special meaning to be given to a term used in the treaty.⁴² According to the same provision, on the one hand, the context shall comprise, in addition to preamble and annexes, any agreement or instrument concluded "in connection with the

⁴⁰ Vienna Convention on the Law of Treaties arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 445–46 (2004) ("Numerous domestic, foreign, and international tribunals have recognized that the Vienna Convention codifies customary international treaty law. The ICJ invokes the Vienna Convention routinely, citing even some of its most controversial provisions as customary law and applying these principles to signatories and non-signatories alike.").

⁴¹ See *Golder v. United Kingdom*, No. 4451/70, ¶ 29 (Eur. Ct. H.R. Feb. 21, 1975), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496>. For a critical view, see Giorgio Gaja, *Does the European Court of Human Rights Use Its Stated Methods of Interpretation?*, in DIVENIRE SOCIALE E ADEGUAMENTO DEL DIRITTO, STUDI IN ONORE DI FRANCESCO CAPOTORTI 213 (1999); see also Letsas, *supra* note 3, at 58; Pierre-Marie Dupuy, *Evolutionary Interpretation of Treaties: Between Memory and Prophecy*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 123, 133 (Enzo Cannizzaro ed., 2011).

⁴² Vienna Convention on the Law of Treaties, *supra* note 40, at art. 31. Among the most recent contributions, see generally Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 105 (Enzo Cannizzaro ed., 2011).

conclusion of the treaty” and accepted by all the parties; on the other hand, account shall be taken, together with said context, of any

subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; . . . [and] any relevant rules of international law applicable in the relations between the parties.⁴³

At first the Grand Chamber looked at the ordinary meaning of the terms employed in Article 2 of Protocol No. 1, and in Article 9 of the European Convention. It found that “respect” for parents’ religious and philosophical convictions and “freedom of . . . religion” did not include the prohibition to display religious symbols in their ordinary meaning.⁴⁴ The Strasbourg Court has consistently interpreted Article 2 of Protocol No. 1 in conjunction with Article 9 of the European Convention to prohibit proselytism and indoctrination by the state, and to require an impartial, objective, and pluralistic approach to all the functions the state exercises with respect to education. The court has not judged the greater visibility of a particular religion as contrary to the European Convention.⁴⁵ And finally, in this respect, the case law has also underlined two other important aspects: First, “the meaning or impact of the public expression of a religious belief

⁴³ Vienna Convention on the Law of Treaties, *supra* note 40, at art. 31. The “[g]eneral rule of interpretation” in Article 31 of the 1969 Vienna Convention is complemented by a rule concerning the “[s]upplementary means of interpretation”—Article 32—and by a rule on treaties authenticated in two or more languages—Article 33. Vienna Convention on the Law of Treaties, *supra* note 40, at art. 31–33.

⁴⁴ See *Lautsi II*, No. 30814/06, ¶¶ 59–62, 66, 70, 72, 76, 77 (finding that the state in keeping crucifixes in school classrooms acted within the limits of the margin of appreciation and did not violate Article 2 of Protocol No. 1 and Article 9 of the Convention).

⁴⁵ See *Folgerø v. Norway*, No. 15472/02, ¶ 84, 34–35 (Eur. Ct. H.R. June 29, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81356>; see also *id.* ¶ 89, at 37 (holding that the fact that Christianity represented a greater part of the curriculum than other religions and philosophies did not constitute a departure from pluralism and objectivity); *Zengin v. Turkey*, No. 1448/04, ¶¶ 51, 53 (Eur. Ct. H.R. Sept. 1, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82580> (finding that Article 2 “does not prevent the States from disseminating in State schools, by means of the teaching given, objective information or knowledge of a directly or indirectly religious or philosophical kind”).

will differ according to time and context”,⁴⁶ and second, in these matters rules may vary according to national traditions, and corresponding choices must be left to the state concerned.⁴⁷ These statements stem directly from the object and purpose of the European Convention—a main element in treaty interpretation—and suggest that a plurality of approaches is not prohibited by the text of the European Convention. In other words, “the *maintenance and further realisation* of human rights and fundamental freedoms” in Europe through the establishment and development of a “common understanding and observance” of human rights⁴⁸ does not require the erasing of national dimensions of human rights protection, nor of national approaches to human rights, to the extent that they are compatible with the common standards, as seems to be the case in the area of the display of religious symbols, which is not yet the object of a common standard at all.

As a second step, the Grand Chamber determined that a common understanding concerning religious displays in state schools did not emerge from the law and practice of the Contracting States. It examined the legislation of the members of the Council of Europe and found that the great majority of states did not regulate the presence of religious symbols in state schools. Such displays were expressly forbidden in three states, yet expressly prescribed in another three, in addition to Italy, as well as in certain regions of two other states.⁴⁹ The Grand Chamber also examined the case law of member states’ supreme courts concerning the legality of state-sponsored displays of religious symbols in state schools, and found, again, that the cases differed depending not only on the specific features of each case, but also on a varying understanding of the concept of state neutrality.⁵⁰ The Grand Chamber concludes, as is well known, that “there is *no European consensus* on the question of the presence of religious symbols in State schools,” and that this

⁴⁶ Sahin v. Turkey, No. 44774/98, ¶ 109 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>.

⁴⁷ *Id.*

⁴⁸ Convention on Human Rights, *supra* note 2, at preamble (emphasis added).

⁴⁹ *Lautsi II*, No. 30814/06, ¶ 27.

⁵⁰ *Id.* ¶¶ 26–28, at 12–13. The point concerning European diversity, and its value, was forcefully made by J.H.H. Weiler, in his oral submission to the Grand Chamber. See J.H.H. Weiler, Editorial, *State and Nation; Church, Mosque and Synagogue—the Trailer*, 8 INT’L J. CONST. L. 157, 162–63 (2010).

circumstance “speaks in favour” of recognizing that the matter falls within the “margin of appreciation” of the Contracting State.⁵¹ In other words, the different models followed in the legislations of the Contracting States, and the different solutions given in their case law, suggest that there is no common approach in Europe to the display of religious symbols in state schools, nor to the exercise of state functions in education, particularly concerning the obligation to respect parents’ religious and philosophical convictions; nor does such consensus exist in the concept of state neutrality towards religion. This assessment implies that the obligation not to display religious symbols in state schools is neither within the meaning of freedom of religion under Article 9, nor within respect for parents’ convictions in education under Article 2 of Protocol No. 1.⁵²

The Grand Chamber’s search for the existence of a European consensus, to ascertain whether the obligation to not display religious symbols is established by the European Convention, has attracted a great deal of criticism.⁵³ I would argue, however, that such criticism fails to see that the relevance of a “European consensus” can be traced back to the rules on treaty interpretation—more specifically, to the concept of subsequent practice mentioned in Article 31, Paragraph 3(b), of the 1969 Vienna Convention, as one of the elements an interpreter must consider in the process of ascertaining the “ordinary meaning . . . [of] the terms” used in a treaty.⁵⁴

⁵¹ *Lautsi II*, No. 30814/06, ¶ 70 (emphasis added).

⁵² This reasoning is criticized in Judge Malinverni’s dissent, joined by Judge Kalaydjieva. Because the presence of religious symbols in state schools is expressly regulated only in a few Contracting States, and not specifically regulated in most of the others, “definite conclusions regarding a European consensus” are difficult to draw. *See id.* at 47 (Malinverni, J., dissenting). But the fact that in the majority of countries this question is not expressly regulated is evidence of lack of a European consensus on their presence. In such a situation—and given the divergences in the case law on the matter—it would be arbitrary to affirm that the presence of religious symbols in state schools is either admitted, or on the contrary, banned in Europe. It is neither, and, therefore, no elements to interpret such state-sponsored displays as incompatible with freedom of religion or with the obligation to respect parents’ convictions derive from the practice of Contracting States.

⁵³ *See* Mancini, *supra* note 21, at 25–26 (stating that relying on consensus allows the European Court to avoid taking responsibility for its actions); Zucca, *supra* note 37, at 226 (criticizing the court’s position that respect is a matter of consensus); *see also Lautsi II*, No. 30814/06, at 47 (Malinverni, J., dissenting).

⁵⁴ Vienna Convention on the Law of Treaties, *supra* note 40, at art. 31.

Conceived for “the maintenance and *further realisation* of human rights and fundamental freedoms,”⁵⁵ the European Convention is a “living instrument” whose meaning evolves over time and whose evolution has to be taken into account to fully appreciate the obligations that it expresses at any given moment.⁵⁶ From this point of view, *subsequent shared practice* in the application of the agreement—that is, a practice establishing the agreement of the parties regarding its interpretation—is precisely the engine through which new common standards that have not found explicit expression in the text, including the additional protocols, might develop. This is particularly true in those areas of the European Convention where the rules are rather open ended, as in the context of education and freedom of religion. In fact, one would expect such rules to undergo progressive development and refining as historical, political, and social conditions change, and as the understanding of human rights protection evolves, revealing legal meanings that were originally hidden in the propositions of the European Convention.

From the point of view of the rules on the interpretation of treaties, then, the lack of a common practice concerning state displays of religious symbols means that an obligation for Contracting States not to allow such displays in state schools cannot be considered as having subsequently developed from the European Convention’s text—notably from Articles 9 of the

⁵⁵ Convention on Human Rights, *supra* note 2, at pmb1. (emphasis added).

⁵⁶ *Sahin v. Turkey*, No. 44774/08, ¶ 136 (Eur. Ct. H.R. Nov. 10, 2005), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>; *Tyrer v. United Kingdom*, No. 5856/72, ¶ 31 (Eur. Ct. H.R. Apr. 25, 1978), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587>. The literature that has dealt with this aspect of the ECHR, and of human rights treaties in general, is vast. See FRANCOISE TULKENS, *DIALOGUE BETWEEN JUDGES: “WHAT ARE THE LIMITS TO THE EVOLUTIVE INTERPRETATION OF THE CONVENTION?”* 7–8 (2011), *available at* http://echr.coe.int/Documents/Dialogue_2011_ENG.pdf (discussing the limits to interpreting the Convention with respect to adapting it to changes that have taken place over time); Dupuy, *supra* note 41, at 133–34 (emphasizing, correctly, that based on the wording of the preamble of the ECHR, “evolutionary” interpretation appears in harmony with its text and is required by its double dynamic: the dynamic of human rights norms, national and international, intrinsically evolutionary in nature, and the dynamic of “ethical concepts embedded in the social fabric of the different member states which produce a number of practices”); Georg Nolte, *Between Contemporaneous and Evolutive Interpretation: The Use of “Subsequent Practice” in the Judgment of the International Court of Justice Concerning the Case of Costa Rica v. Nicaragua (2009)*, in 2 *COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM 1675, 1675–84* (Holger P. Hestermeyer et al. eds., 2012).

European Convention and 2 of Protocol No. 1—read in the light of the context defined in Article 31, Paragraphs 2 and 3, of the 1969 Vienna Convention. In this perspective, the often criticized reference by the European court, as part of its assessment of the “margin of appreciation,” to the lack of a European consensus as a reason to consider the subject matter within Contracting States’ discretion, appears to be legally sound: It serves to find that the obligation cannot be considered as having been subsequently developed from the European Convention’s text, and is not therefore, part of the common standard that Contracting States are bound to implement. Thus, it is not an unnecessary or extravagant reference, but one that is dictated by the general rules on treaty interpretation, which stipulate that the object and purpose of a treaty and the common practice of the contracting parties in its application are among the criteria to use in ascertaining the ordinary meaning of the terms of the treaty and the obligations imposed. This is an insufficiently considered aspect of the “margin of appreciation” approach in the case law of the European Court of Human Rights: Even those authors who have defended the objective nature of the European consensus assessment,⁵⁷ have not, to my knowledge, recognized its legal basis in the rules on treaty interpretation as being a correct application, in the context of the European Convention, of the “subsequent practice” provision of the 1969 Vienna Convention.⁵⁸ However, the connection to the rules on interpretation is crucial for at least two reasons. First, linking the search for a “European consensus” to Article 31 of the 1969 Vienna Convention ensures that the Strasbourg Court remains within the limits of a permissible evolutionary interpretation,⁵⁹ and does not exercise sheer norm creation. The latter would be incompatible with the European Convention’s structure as an

⁵⁷ See MacDonald, *supra* note 3; Greer, *supra* note 3, at 5 (stating that the margin of appreciation is itself one of the Convention’s principles of interpretation deriving, together with the others employed by the court, from the teleological principle stemming from Articles 31 to 33 of the 1969 Vienna Convention).

⁵⁸ Vienna Convention on the Law of Treaties, *supra* note 40, at art. 31.

⁵⁹ In fact, where evolutionary interpretation rests on subsequent practice, it appears in conformity with Article 31 of the Vienna Convention; and the ECHR is a treaty that, from the point of view of its content (filled with terms that are subject to evolution by their very nature); purposes (the *further realisation* of human rights together with their maintenance); and institutional dimension (mainly represented by the court and the Committee of Ministers), is required to be interpreted in the light of present conditions.

international treaty and with the role of the court as the institution established by the Contracting States for its interpretation.⁶⁰ Second, it would promote the consistent use of the European consensus standard by the Strasbourg Court, respectful of the conditions required by Article 31(2)(b) of the 1969 Vienna Convention, for "subsequent practice" to qualify as a criterion of interpretation.⁶¹

B. *The "Margin of Appreciation" and Subsidiarity*

The "margin of appreciation" should also be evaluated in light of the principle of subsidiarity. Due to the need for brevity and because the connection between the "margin of appreciation" and subsidiarity is widely recognized, I will only briefly sketch my argument.

International human rights law establishes common standards and creates supervisory mechanisms designed to operate as a *subsidium* to national human rights law.⁶² The European court has consistently acknowledged and relied on the subsidiary character of the European system for the protection of human rights. In principle, the democratic state is better positioned to interpret its community's interests where the values of individual and collective life are concerned. Moreover, such a state is better positioned to assess the need for restrictions on human rights, according to the discipline of the European Convention. Therefore, national judges are the "front-line" judges in the enforcement of the European Convention, and

⁶⁰ Dupuy, *supra* note 41, at 135 ("[The] margin of appreciation in many cases serves to do away with the need for the Court to provide a radical evolutionary interpretation of certain freedoms.").

⁶¹ The inconsistencies in the application of the European consensus standard have been analyzed in depth. See Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 135 (1993).

⁶² This aspect of international human rights law is widely recognized, and, as we will see, it is receiving renewed attention both in the literature and within human rights bodies. See generally Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003). For specific reference to the European Convention, see Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 4, 41 (R. St. J. Macdonald et al. eds., 1993); Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 127–28 (2008); see also Monica Lugato, *Sulla Sussidiarietà In Diritto Internazionale* [On Subsidiarity in International Law], 231 ARCHIVIO GIURIDICO FILIPPO SERAFINI 129 (2011).

the enforcement mechanism devised by the European Convention is itself subsidiary to the national judiciaries of the contracting parties.⁶³

The importance of the principle of subsidiarity has been strongly emphasized in the High Level Conferences on the Future of the European Court of Human Rights.⁶⁴ In the Interlaken Declaration on February 19, 2010, which “[s]tress[ed] the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level,” the Conference called for “a strengthening of the principle of subsidiarity,” which “implies a shared responsibility between the States Parties and the Court.”⁶⁵ At the more recent Brighton Declaration in April 2012, the High Level Conference on the Future of the European Court of Human Rights returned to subsidiarity and the “margin of appreciation” affirming that:

The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to

⁶³ See *Handyside v. United Kingdom*, No. 5493/72, ¶¶ 48–49, at 17–18 (Eur. Ct. H.R. Dec. 7, 1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>. For analysis in the area of religious freedom, see *Dogru v. France*, No. 27058/05, ¶ 63 (Eur. Ct. H.R. Dec. 4, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039>; *Sahin v. Turkey*, No. 44774/98, ¶ 109 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>. A great deal of attention has been increasingly dedicated by the Strasbourg organs to the issue of the relationship between national judges and the Court. See generally EUROPEAN COURT OF HUMAN RIGHTS, *DIALOGUE BETWEEN JUDGES: HOW CAN WE ENSURE GREATER INVOLVEMENT OF NATIONAL COURTS IN THE CONVENTION SYSTEM?* (2012), available at http://echr.coe.int/Documents/Dialogue_2011_ENG.pdf.

⁶⁴ The future of the court, shadowed by a growing backlog of pending cases, has been at the center of three such conferences, held in 2010 in Interlaken, 2011 in Izmir, and 2012 in Brighton. See *Reform of the European Court of Human Rights*, COUNCIL OF EUROPE, <http://hub.coe.int/what-we-do/human-rights/reform-of-the-european-court> (last visited Sept. 23, 2013).

⁶⁵ EUROPEAN COURT OF HUMAN RIGHTS, *HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS: INTERLAKEN DECLARATION 1–2* (2010), available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.⁶⁶

The protection of human rights is both a matter for national—constitutional—law and international law. Therefore, it lends itself particularly well to the application of the principle of subsidiarity, which is an organizing principle of the allocation of authority among the local, national, and international orders. Subsidiarity requires that society does not pre-empt individuals in tasks that they can perform for themselves and that the larger community does not perform functions that smaller communities can accomplish themselves. Both legislating—setting standards—and enforcing human rights are for national authorities to decide. Only where national authorities fail are the international authorities called upon to *subsidize* them. "Subsidize them" means to assist them to reach an autonomous capacity to provide for human rights protection at the level that has been internationally agreed. It also means to substitute for national authorities in extreme cases, where protection is altogether failing.⁶⁷

In light of this, the "margin of appreciation" is one of the logical consequences of subsidiarity: If the state is better positioned to set, adjudicate, and implement standards for its national community, then the international institution should only intervene to redress violations of internationally agreed standards when the state shows an inability—or unwillingness—to act. Thus, subsidiarity provides justification for the attitude of the European court in recognizing the discretionary space of

⁶⁶ *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, COUNCIL OF EUROPE, <http://hub.coe.int/20120419-brighton-declaration> (last visited Sept. 23, 2013). For further analysis, see generally Laurence R. Helfer, *The Burdens and Benefits of Brighton*, ESIL REFLECTIONS (June 8, 2012), <http://www.esil-sedi.eu/sites/default/files/Helfer%20Benefits%20and%20Burdens%20of%20Brighton%203June2012-2.pdf>.

⁶⁷ From this point of view, "embeddedness" as advocated by Helfer, appears to be an expression of subsidiarity, rather than a complement to it. See Helfer, *supra* note 62, at 131. In fact, when domestic remedies are unavailable, the principle of subsidiarity requires that the international authority substitute the national remedy and aim at bolstering domestic compliance with internationally protected human rights. Helfer, *supra* note 62, at 129–30.

Contracting States in the implementation of the European Convention, especially in areas where they appear to have undertaken no obligations and no obligations can be deemed to have arisen from their common practice.

The European court's adoption of a subsidiarity approach is required by legitimacy considerations inherent in the subsidiarity discourse: National authorities—at least in democratic countries—are more legitimate legislators, judges, and administrators than international authorities. And subsidiarity is also required as a safeguard for pluralism, which is at the heart of the international protection of human rights. Finally, subsidiarity offers another justification for the self-restraint of the European court when faced with unsettled aspects of human rights protection. For instance, in *Karatas v. Turkey*, the court stated that “the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint.”⁶⁸ Commentators argue that international courts are sub-optimal decision-makers in comparison to national authorities because they are detached from local communities, lack local perception of legitimacy, and are affected by a democratic deficit.⁶⁹

⁶⁸ *Karatas v. Turkey*, No. 23168/94, at 35 (Eur. Ct. H.R. July 8, 1999) (Wildhaber, J., dissenting), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58274>; see also *Handyside*, No. 5493/72, ¶ 48; Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, ¶ 10 (Eur. Ct. H.R. July 23, 1968), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57525> (discussing certain aspects of the laws on the use of languages in education); Mahoney, *supra* note 22, at 3–4, 6. Even harsh critics of the “margin of appreciation” approach agree that if effective domestic institutional and judicial guarantees are in place, then “deference to their outcomes, through the margins doctrine, may be called for.” Benvenisti, *supra* note 3, at 849. For a valuable discussion of the relevance of the institutional differences between constitutional and international courts for decisions on religious symbols, see generally Dominic McGoldrick, *Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?*, 11 HUM. RTS. L. REV. 451 (2011); Movsesian, *supra* note 37.

⁶⁹ Shany, *supra* note 5, at 918; see also OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 324 (2010); see generally Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012). The “priority” of national authorities over the European Court of Human Rights is recognized, with specific reference to *Lautsi*, in Zucca, *supra* note 37, at 228 (criticizing the Grand Chamber judgment).

It is doubtful that the purpose of the European Convention is absolute uniformity in all aspects of the protection of human rights among all forty-seven members of the Council of Europe. In the words of one commentator, "[I]s it realistic to pretend that the whole continent will be covered by a 'common European standard', *in each and every aspect of an individual's life*?"⁷⁰ For the time being, it seems that a negative answer flows from the very aims of the European Convention, as interpreted by its court, through considerations of subsidiarity and sheer historical facts.⁷¹

In these respects, the question can be raised whether the national acts imposing the display of crucifixes in the classrooms of Italian state schools⁷² can legitimately be deemed a "democratic" expression of the Italian polity.⁷³ A consistent element in the "margin of appreciation" assessment is the democratic character of the relevant national authority and of the local decision-making processes, having led to the contested norms. For example, in *Sahin v. Turkey*, the European court emphasized that "the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement to weigh up the various interests at stake."⁷⁴ This specific aspect of the Italian regulations concerning the display of the crucifix must be tackled, but the task is not for the European court, but the national community.⁷⁵

⁷⁰ JAN ERIK HELGESEN, DIALOGUE BETWEEN JUDGES: "WHAT ARE THE LIMITS TO THE EVOLUTIVE INTERPRETATION OF THE CONVENTION?" 7–8 (2011) (emphasis added), available at http://echr.coe.int/Documents/Dialogue_2011_ENG.pdf; Sapienza, *supra* note 3, at 117.

⁷¹ See *Sunday Times v. United Kingdom*, No. 6538/74, ¶ 61, at 30–31 (Eur. Ct. H.R. Apr. 26, 1979), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57583>.

⁷² Examined with reference to relevant national case law by DI PAOLO CAVANA, LA QUESTIONE DEL CROCIFISSO IN ITALIA [THE QUESTION OF THE CRUCIFIX IN ITALY] (2004), available at http://www.olir.it/areetematiche/75/documents/Cavana_questionedelcrocifisso.pdf.

⁷³ See *Lautsi v. Italy*, No. 30814/06, ¶¶ 1–2, at 48–49 (Eur. Ct. H.R. Mar. 18, 2011) (Malinverni, J., dissenting), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

⁷⁴ *Sahin v. Turkey*, No. 44774/98, ¶ 159 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>.

⁷⁵ On this aspect of the *Lautsi* case, see the very sharp remarks of Spadaro, *supra* note 21. J.H.H. Weiler also stressed that it is up to the national community to decide matters concerning the status of religion in the public sphere in his oral submission to the Grand Chamber. See Weiler, *supra* note 50, at 163.

CONCLUSION

It is interesting to observe that very nuanced position as to the content of human rights obligations in the area of religious displays has been expressed by prominent interpreters. The Human Rights Committee in both the General Comment No. 22 on Freedom of Religion,⁷⁶ and the Special Rapporteur on Freedom of Religion and Belief acknowledged the complexity of the topic, the absence of a general blueprint applicable to all constellations or situations, and the need for a case by case approach.⁷⁷ In this respect, the “margin of appreciation” and subsidiarity represent important tools to accommodate effective protection of the right to religious freedom and the right to education with due consideration of the place of religion in any given society. In addition, further research into their dynamics is required for an appropriate legal and not ideological approach to human rights treaties.

⁷⁶ General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), Hum. Rts. Comm., U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993), *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>.

⁷⁷ *See* Report of the Special Rapporteur on Freedom of Religion and Belief, Hum. Rts. Council, ¶¶ 41–46, U.N. Doc. A/HRC/19/60 (Dec. 22, 2011); *see also* ODIHR ADVISORY COUNCIL, TOLEDO GUIDING PRINCIPLES ON TEACHING ABOUT RELIGIONS AND BELIEFS IN PUBLIC SCHOOLS 77 (2007).