Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

The Responsibility of Educational Administrations for the Removal of Religious Symbols

Question(s) at stake:

1) Whether the display of crucifixes in a public school is contrary to neutrality. 2) Whether the public authorities are responsible for the removal of crucifixes in public schools.

Outcome of the ruling:

The Court upheld the contested administrative action brought by the Association of Parents of Pupils of the Public School of San Benito against the decision of the Director General of Educational Centres of 20 May 1999 on the grounds that it is for the educational administration, and not the school board, to decide whether or not to maintain symbols of a particular religion or ideology in public schools, regardless of whether or not its decision is in accordance with the criteria of the governing bodies of each school on this specific issue.

Topic(s):

- Education

Keywords:

- Crucifix
- Freedom of thought, conscience and religion
- Static religious symbols
- Right of parents to ensure the religious and moral education of their children
- State neutrality

Tag(s):

- Active and passive religious symbols

- Positive and negative religious freedom
- Indoctrination

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Country:

Spain

Official citation:

High Court of Justice Madrid, Judgment of 15 October 2002, no. 1105/2002 (Tribunal Superior de Justicia Madrid, Sentencia de 15 de octubre de 2002, Sentencia número 1105/2002)

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ECLI:

ECLI:ES:TSJM:2002:13636

Date:

15 October 2002

Jurisdiction / Court / Chamber:

High Court of Justice Madrid, Contentious Administration Chamber

Remedy / Procedural stage:

Appeal

Previous stages:

No information found

Subsequent stages:

No information found

Branches / Areas of law:

Administrative law

Facts:

This case concerns the presence of crucifixes and religious images in a public school. The appellant, in this case the Association of Parents of Pupils of the Public School of San Benito, requested the school council to remove crucifixes and religious images from the school's classrooms. Upon receiving this demand, the school's director, as president of the council, refused to discuss the matter and did not respond to the written request dated 12 May 1998.

Subsequently, the aforementioned association submitted the same request to the Provincial Directorate of the Ministry of Education and Culture, which decided on 11 January 1999 to reject the request because there was no violation of any regulation regarding the display of Catholic religious symbols in public educational institutions.

The decision was also the subject of an appeal to the Directorate General for Educational Centres, which concluded that "the administration cannot impose the removal of the crucifixes, as the complainants request, but that the school council should be the body to discuss and decide on this matter". Subsequently, after exhausting all administrative procedures, another appeal was filed by the Association of Parents of Pupils of the Public School of San Benito.

Ruling:

The appeal in this case is based on the absence of a final administrative decision on whether or not to remove Catholic religious symbols in this particular school. The claim concerns which body is competent to decide whether to remove the crucifixes.

According to Article 27.7 of the Constitution, Organic Law 8/1985 of 23 July 1985 on the Right to Education, and Organic Law 9/1995 of 20 November 1995 on the Participation, Evaluation, and Management of Educational Institutions, school

councils are the bodies responsible for the participation of the school community in educational activities.

On the one hand, the school council is responsible for ensuring compliance with constitutional principles (Article 18.2 of Organic Law 8/1985, Article 8.1 of Organic Law 9/1995, Article 7 of Royal Decree 82/1996). On the other hand, it is also responsible for promoting the renovation of school facilities and equipment (Article 42.1 of Organic Law 8/1985, Article 11.1 of Organic Law 9/1995, Article 21 of Royal Decree 82/1996) and for approving and evaluating the school's general programme, supervising the general educational activity, establishing guidelines, and approving the educational project (Article 42.1 of Organic Law 8/1985, Articles 6.1 and 11.1 of Organic Law 9/1995, and Article 21 of Royal Decree 82/1996).

These provisions reflect the functions of the school council, which may coincide to a large extent with those of other governing bodies and even with those of the educational administration. The aforementioned laws classify the school council as one of the school's governing bodies and grant it a number of powers, none of which relate to the display or exhibition of religious or other symbols in the classroom as referred to by the Court.

The Court partially upheld the contentious administrative appeal lodged by the Parents' Association of San Benito Public School against the Director General of Educational Centres' decision of 20 May 1999. The latter had partially granted an appeal against the resolution of the Deputy Territorial Director for Madrid-Centre dated 11 January 1999, which the Court annulled for being contrary to the law. Consequently, the Directorate has been instructed to reach a final decision on the appellants' request to remove crucifixes from classrooms at the aforementioned school. Therefore, according to the Court, it is for the educational administration and not the school council to decide whether or not to maintain symbols of a particular religion or ideology in public schools, regardless of whether or not its decision is in line with the criteria of the governing bodies of each school on this specific issue.

Main quotations on cultural or religious diversity:

- “La exposición de símbolos de una determinada religión en los Centros puede analizarse desde diversas ópticas, esto es, desde la más transcendente de la manifestación de la confesionalidad del Estado, con el corolario de la violación del derecho fundamental a la libertad religiosa, que es de la que participa la Asociación recurrente, hasta la puramente pedagógica o educativa o la que atañe a las instalaciones o dotaciones del Centro. El Consejo Escolar dispone de atribuciones vinculadas a todos estos aspectos o manifestaciones, puesto que existe la obligación de los órganos de gobierno de velar por el cumplimiento de los principios constitucionales (artículos 18.2 de la Ley Orgánica 8/1985, 8.1 de la Ley Orgánica 9/1995,7 del Real Decreto 82/1996), de aprobar y evaluar la programación general del Centro, supervisar la actividad general en sus aspectos docentes, el establecimiento de las directrices y la aprobación del proyecto educativo [artículos 42.1 0 y 1) de la Ley Orgánica 8/1985, 6.1 y 11.1 a), h) y j), de la Ley Orgánica 9/1995, y 21 a), i), j) y m) del Real Decreto 82/1996], y de promover la renovación de las instalaciones y equipo escolar [artículos 42.1 k) de la Ley Orgánica 8/1985, 11.1 g) de la Ley Orgánica 9/1995, 21 h) del Real Decreto 82/1996]. Estos preceptos, citados sin ánimo de exhaustividad, reflejan claramente la amplitud y generalidad de las funciones del Consejo Escolar, que pueden, en buena parte, concurrir con las de otros órganos de gobierno e incluso con las de la Administración educativa. Nada obsta, por tanto, a que en el seno del Consejo se plantee y decida la retirada o mantenimiento de los símbolos religiosos de ese Centro en concreto.”

“The display of symbols of a particular religion in schools can be analyzed from various points of view, ranging from the more relevant manifestation of the confessional nature of the State, with the corollary of the violation of the fundamental right to religious freedom, which is the perspective taken by the appellant association, to the purely pedagogical or educational aspect or that which concerns the facilities or equipment of the school. The School Council has powers linked to all these aspects or manifestations, given that the governing bodies are obliged to ensure compliance with constitutional principles (Article

18.2 of Organic Law 8/1985, Article 8.1 of Organic Law 9/1995, Article 7 of Royal Decree 82/1996), to approve and evaluate the general programming of the school, to supervise the general activity with respect to teaching, to establish guidelines, and to approve the educational project (Article 42.1 0) and 1) of Organic Law 8/1985, Articles 6.1 and 11.1 a), h), and j) of Organic Law 9/1995, and Article 21 a), i), j), and m) of Royal Decree 82/1996), and to promote the renovation of school facilities and equipment (Article 42.1 k) of Organic Law 8/1985, Article 11.1 g) of Organic Law 9/1995, Article 21 h) of Royal Decree 82/1996). These precepts, which are not intended to be exhaustive, clearly reflect the breadth and generality of the functions of the School Board, which may, to a large extent, coincide with those of other governing bodies and even with those of the educational administration. There is, therefore, nothing to prevent the removal or maintenance of religious symbols from being raised and decided within the Council for that particular school." (legal reasoning 3, para. 17)

Main legal texts quoted in the decision:

Domestic law:

- Articles 14, 16, 27, 53 Spanish Constitution
- Articles 1, 2 Organic Law 7/1980 of 5 July 1980 on Religious Freedom
- Article 18, 42 Organic Law 8/1985 of 3 July 1985 regulating the Right to Education.
- Article 12 of Law 30/1992 of 26 November 1992 on the Legal Regime of Public Administrations and Common Administrative Procedure
- Royal Decree 2438/1994 of 16 December 1994 regulating the Teaching of Religion
- Articles 6, 8, 11 Organic Law 9/1995 of 20 November 1995 on the Participation, Evaluation, and Governance of Educational Institutions
- Articles 7, 21 Royal Decree 82/1996 of 26 January 1996 approving the Organic Regulations of Preschools and Primary Schools
- Article 10 Law 29/1998 of 13 July 1998 regulating the Contentious Administrative Jurisdiction
- Articles 2, 5, 8 Organic Law 2/2006 of 3 May 2006 on Education

- Articles 4, 6, 12 Organic Law 3/2020 of 29 December 2020 amending Organic Law 2/2006 of 3 May 2006 on Education

Cases cited in the decision:

None

Commentary

The Responsibility of Educational Administrations for the Removal of Religious Symbols

When assessing the presence of religious elements in the public sphere, it is necessary to take into account the objective aspect of freedom of religion, which is expressed in the non-confessional nature of the Spanish state, and the subjective aspect, which relates to the rights of the persons concerned. When it comes to specific religious symbols in schools, the courts should be the last resort for a solution that could be mediated between school councils, education administrations, and the parents of the children. Solutions that involve a reasonable accommodation of beliefs, perhaps by moving religious symbols to areas of the school where they are less visible or removing them when certain classes are taught or certain students attend, could provide a balanced solution that does not require the judiciary to dictate something that could be resolved in the educational sphere.

Some may argue that a democratic state must be non-denominational to function. However, the place of religious beliefs in the life of individuals is a conflictual issue in all democratic countries, and the increasing secularization of society has only renewed and intensified the debates surrounding this issue (Rey Martínez 2012: 4). In these cases, it is important to find a reasonable balance between the two dimensions of religious freedom, *positive* religious freedom and *negative* religious freedom. This means that religions cannot shape legislation according to their values (although they can participate in public debate) and that in a secular state, public authorities cannot intervene in religious matters that affect their dogmas and the faith of citizens (Rey Martínez 2012: 4). The present case is a clear example of this, since the main question is whether the

educational administrative authorities acted properly in resolving a dispute that should not have been resolved by the courts. The display of crucifixes in public schools has been an issue in various EU countries, since it concerns the alleged neutrality of the state. There was a *before* and *after* in the judicial handling of this matter, marked by the decision of the Grand Chamber of the ECtHR in *Lautsi and Others v. Italy*, App. no 30814/06, 18 March 2011. The first chamber upheld the appeal on the basis of "negative" freedom of religion, considering that the compulsory and highly visible presence of crucifixes in classrooms not only clashed with the secular beliefs of the mother of the pupils, whose children were then attending a state school, but was also emotionally disturbing for pupils of non-Christian religions or those who professed no religion (*Lautsi and Others v. Italy*, para. 31). Surprisingly, the Grand Chamber then ruled that "there was no evidence before the Court that the display of a religious symbol on classroom walls could have an influence on pupils and therefore it could not reasonably be said that it could have an effect on young people whose beliefs were still being formed". Another controversial aspect of the decision was the consideration of the crucifix as a historical and cultural symbol which has a "value linked to identity" for the Italian people, since it represents in some way the historical and cultural development characteristic of Italy and, more generally, of the whole of Europe (*Lautsi and Others v. Italy*, para. 15).

The case under discussion is situated in a Spanish and European context prior to the *Lautsi and Others v. Italy* judgment, as well as to the most relevant Spanish crucifix case to date: High Court of Justice in the Autonomous Community Castilla y León, Judgment of 14 December 2009, no. 3250/2009 (Tribunal Superior de Justicia de Castilla y León, Sentencia de 14 de diciembre, num. 3250/2009) ECLI:ES:TSJCL:2009:6638 (see Céspedes 2020). This judgment held that the decision of the Macías Picavea Public School Council not to remove Catholic religious symbols violated the constitutional principle that no religion may have a state character (Article 16(3) of the Spanish Constitution) and the right not to be discriminated against on grounds of religion or belief (Article 14 of the Spanish Constitution). The judge acknowledged that the presence of religious symbols in

classrooms and common areas of the school was neither part of the teaching of the Catholic religion nor could be considered an act of proselytizing, but concluded that it was contrary to the Constitution (see above, Rey Martínez 2012: 15; Céspedes 2020).

Contrary to that case, the High Court of Justice of Madrid considers that the subject of the dispute is the determination of the competence of the school council and the consequent lack of competence of the education administration. As the Court points out, school councils are the bodies responsible for the basic internal rules of the school, such as the participation of teachers, parents, and, where appropriate, pupils in the control and management of the school, referring to the law to determine the modalities and extent of their participation. There is no explicit reference to school councils having the power or authority to decide on the display or exhibition of religious or other symbols in educational establishments.

In its analysis, the Court weighed up whether it was a relevant decision concerning the neutrality of the state or simply a pedagogical issue concerning the facilities or equipment of the school. It is therefore for the education authorities, and not the school council, to decide whether or not it is appropriate to maintain symbols of a particular religion or ideology in public schools, regardless of whether or not their decision is in line with the criteria of the governing bodies of each school on this specific matter. Furthermore, the Court concluded that it was unacceptable that the complainant had not been able to obtain a final decision on the grounds of the lack of competence of the school council, and subsequently of the education authorities.

The relevant question in the Spanish context is whether, as in *Lautsi*, the crucifix can be seen as a marker of identity, since it can represent or challenge a cultural development. Given the implications of the presence of crucifixes, the question arises as to whether school councils are the bodies that should decide on this matter. Public schools are an institution that materializes the knowledge of a country and transmits it to its citizens in the form of education. Therefore, even in secular countries, the culture of that country should be taught even if it has

religious implications as part of a religious past. This teaching may be direct or indirect, but school councils can have a decisive influence on the nature of the school in religious matters. However, when it comes to such a fluid concept as culture, the competence of school councils may be questioned. If a crucifix represents the cultural development of a country, then other educational bodies or the judiciary may be better placed to decide on this matter than a school council, but if we alienate the cultural value of a crucifix as a mere religious symbol, then school councils should have the competence to decide whether or not to display it, according to the nature of the school and constitutional principles.

Regarding the display of majority symbols supported by majorities and how the public administration has usually responded to minority symbols personally worn by members of those minorities, we would probably conclude that there is a common and general tendency to minimize pluralism (Relaño Pastor 2011: 397). Ultimately, the issue hinges on the difference between "*passive*" and "*active*" symbols, the implications of "*negative*" and "*positive*" religious freedom, the neutrality or confessionalism of a state, and the extent to which a crucifix in this case can teach or indoctrinate pupils. Some may question whether even religious symbols that are more decorative than religious do not affect pupils' learning. Others might think that there is a direct relationship between the crucifix and the pupil and that the symbol on the wall has an active message and meaning, and that its presence inculcates this meaning in the pupils. In *Lautsi*, however, we saw the "connotation" aspect of the crucifix, since millions of Italians have been taught with crucifixes in the classroom and seem to have been able to resist any influence (Fancourt 2016: 11). The crucifix, perhaps its religious character, is a socio-cultural element like so many others. To comply with the non-confessional nature of the state, Spanish society has undergone a process of secularization of religious traditions in which religious elements, such as names, streets, and schools, or symbols or emblems with religious connotations have been transformed into historical and cultural elements (Prieto Álvarez 2013: 10). In many cases, these manifestations are tolerable and compatible with non-confessionalism in public schools. The question remains whether the same could

be said of crucifixes – if it is possible to separate their religious message from their social or historical element such that they could be accepted by a public institution.

Literature related to the main issue(s) at stake:

- **General legal literature on the topic that may not be directly connected with the case**:

- Céspedes, Rodrigo. 2020. “Religious Symbols in the Classroom: Children’s Rights and Balancing Between Majority and Minority Rights”. Halle (Saale): Max-Planck-Institute for Social Anthropology, Department of Law and Anthropology.
- Cliteur, Paul. 2019. “The Crucifix and the Ideal of a Religiously Neutral State”. *Journal of Church and State* 61 (2): 181–199.
- Fancourt, Nigel. 2016. “The Educational Competence of the European Court of Human Rights: Judicial Pedagogies of Religious Symbols in Classrooms”. *Oxford Review of Education* 48 (2): 131–147.
- Prieto Álvarez, Tomás. 2013. “La presencia del crucifijo en las escuelas públicas es compatible con la Constitución: (una réplica)”. *Revista jurídica de Castilla y León* 31: 1–39.
- Relaño Pastor, Eugenia. 2011. “El asunto del crucifijo en el TEDH: hacia una solución de compromiso”. *Anuario de derecho eclesiástico del Estado* 27: 393–431.
- Rey Martínez, Fernando. 2012. “¿Es constitucional la presencia del crucifijo en las escuelas públicas?”. *Revista jurídica de Castilla y León* 27: 1–32.
- Sabau, José. 2012. “Símbolos religiosos, escuela pública y neutralidad ideológica estatal: el caso del crucifijo (Religious Symbols, Public Schools and the State Neutrality Principle: The Crucifix Case)”. *Revista de Derecho Político* 85: 273–292.

- Weiler, Joseph H. H. 2012. “El Crucifijo en las aulas: libertad de religión y libertad frente a la religion”. *Scripta theologica: revista de la Facultad de Teología de la Universidad de Navarra* 44 (1): 187–199.
- Zucca, Lorenzo. 2013. “Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber”. *International Journal of Constitutional Law* 11 (1): 218–229.

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